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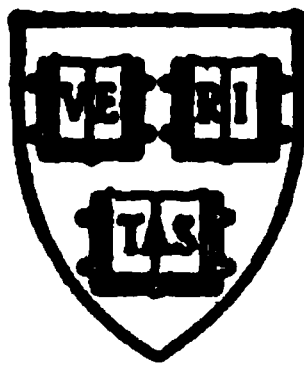
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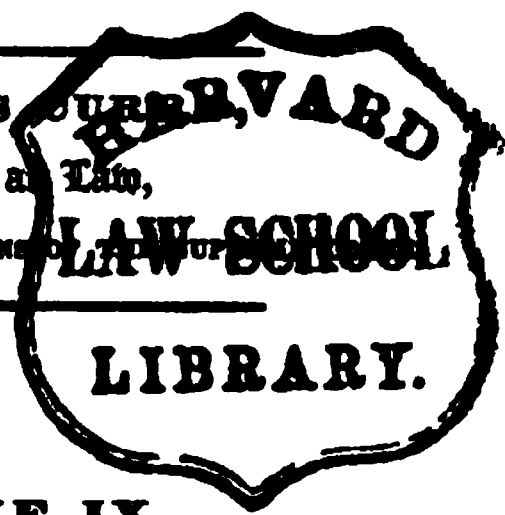
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may 1

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

By **THOMAS CURRY, VARD**
Counsellor at Law,
AND REPORTER OF THE DECISIONS OF THE SUPREME COURT.



VOLUME IX.

NEW-ORLEANS:

PRINTED BY BENJAMIN LEVY, CHARTRES-STREET.

1836.

JUDGES
OF
THE SUPREME COURT,

DURING THE PERIOD EMBRACED IN THIS VOLUME.

Honorable GEORGE MATHEWS,

“ FRANÇOIS-XAVIER MARTIN,

“ HENRY A. BULLARD.

**Judge MATHEWS did not sit during most of the months of April and May,
on account of indisposition.**

**NOTE.—There were between forty-five and fifty cases decided at the June
term, which are unavoidably postponed for want of room. They will appear
among the first in the tenth volume, which will be published about the first of
January next.**

July 20, 1836.

R U L E S
OF
THE SUPREME COURT,

ADOPTED SINCE THE PUBLICATION OF THE FIRST VOLUME OF LOUISIANA REPORTS.

MAY 14, 1832.

“It is ordered, that all causes which have stood on the docket for the space of eighteen months without being set down for trial, shall be removed therefrom, and placed on a separate docket, to be called *delay docket*; and it is further ordered, that they shall not be again put on the trial docket, unless on motion addressed to the court, and leave granted thereon.”

DECEMBER 8, 1835.

“It is ordered, that no person applying for admission as an attorney and counsellor at law, shall be received as such until three judicial days have elapsed from and after the date of his application, and until his name as a candidate for admission shall have been published for a like time at the foot of the trial list, posted up in the clerk's office: such application to be made through the clerk.”

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

WESTERN DISTRICT.
OPELOUSAS, 1835.

OFFUTT ET AL. vs. HENDSLEY ET AL.*

**APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE
OF THE DISTRICT PRESIDING.**

Gold and silver only can be legally tendered in payment of debts. So, **WESTERN DIST.**
a twelve months' bond, taken for the price of the adjudication of property **1835.**
of a debtor, seized and sold by a creditor, is nothing more than a bond **OFFUTT ET AL.**
and security with mortgage on the property sold, and which does not **vs.**
discharge the original obligation or judgment. **HENDSLEY ET AL.**

A judicial sale made to effect the payment of mortgage debts, has also the
effect of transferring the thing sold, free and unincumbered of the
mortgage previously existing on it, even when sold for a less sum than
that for which it was mortgaged.

When mortgaged property passes by a judicial sale into other hands than
those of the judgment debtor and mortgagor, the mortgage attaches to
the *price*, and the purchaser takes the property free and unincumbered.

* The present case was decided by Judges Martin and Bullard, during the recess, and sent
to the clerk. The regular term of this court, in September, 1835, failed in consequence of the
sickness of the Judges.

CASES IN THE SUPREME COURT

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1835.

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vs.
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But where a slave is seized and sold by a judgment creditor, and purchased in by the debtor, on his twelve months' bond, it becomes immediately affected by the general mortgage resulting from the judgment, as well as by the special mortgage given in the twelve months' bond to the sheriff.

So, where a debtor buys in his own property on a twelve months' bond, it is not released from the original mortgage resulting from the judgment under which it was sold.

There is a privity of contract between the surety of a debtor and the creditor which compels the latter to preserve his rights for the former.

A subsequent mortgagor, the vendee of the original mortgagor having an interest, may discharge all anterior mortgages, and as a matter of right be subrogated to all the creditors' rights to the mortgaged property.

There is no privity of contract between a vendee of a mortgage and the creditor of the original mortgagor.

The original mortgagee creditor may indulge his debtor with a delay, or in any other manner to facilitate the payment of his debt, without violating the rights of a subsequent mortgagee between whom there is no privity of contract.

A mortgage creditor, having the vendor's privilege and mortgage with personal security, and an additional mortgage by a judgment and sale of the mortgaged property on a twelve months' bond, with security, may pursue either of his remedies: by seizure and sale of the property in the hands of a third possessor, or proceed against the sureties.

The privileges and mortgages of creditors to property sold at the probate sale of a succession attach to the price, and the purchaser takes the thing sold free of incumbrance, when these creditors were creditors of the deceased; but if not, then their mortgages follow the property into whose soever hands it may come.

The act of 1833, relative to injunctions, *disallows* the principle established by the Supreme Court, (5 *Louisiana Reports*, 87) "that a privity must exist between the party enjoining and the judgment enjoined," to entitle the party to damages.

To entitle a party to an increase of damages for the wrongful suing out an injunction, suit must be instituted on the bond.

This suit commenced by injunction to stay the proceedings under an order of seizure and sale, which the defendants obtained against a certain mortgaged slave named Randal,

in the possession of the plaintiffs in the injunction, to satisfy and pay the sum of seven hundred and fifty-four dollars, with interest, due on the original price of said slave. This slave was originally purchased at the probate sale of the succession of William Thompson, deceased, in December, 1819, by William Haslett for one thousand five hundred and ten dollars, on a credit, who gave William Moore and M. Collins as his sureties, the slave remaining mortgaged until payment. In 1822, the present defendants in the injunction, (Mrs. Hendsley and her children, widow and heirs of Thompson) obtained a judgment against Haslett and his sureties for the price of the slave, Randal, which was recorded in December, 1823, and operated as a general mortgage on the property of the parties to it, with the vendor's privilege on the slave. Execution issued in September, 1823, on the judgment, was levied on the slave, Randal, who was sold and bid in by Haslett, for one thousand two hundred and sixty dollars and fifty cents, on a twelve months' bond, with G. King as surety, the slave remaining specially mortgaged until payment of the bond.

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In June, 1825, Haslett sold this slave to John Davis with all the previous mortgages and privileges on him, for one thousand two hundred dollars. Davis died in 1826, and the slave in question was sold at the probate sale of his succession, to Joseph Irwin. In 1832, Boardman bought Randal at the sale of Irwin's succession and sold him to the present plaintiffs in the injunction.

The plaintiffs allege that the order of seizure and sale obtained by the defendants was illegal. That neither the vendor's privilege and mortgage in virtue of the original sale to Haslett, nor the mortgage under the execution and twelve months' bond exist. The judgment on which the execution issued, retained no privilege or mortgage, and it being unappealed from must be considered as acquiesced in, and the privilege and mortgage waived or tacitly renounced. And even if the privilege and mortgage had been retained in the judgment, and existed afterwards, the sale under this judgment, on a twelve months' bond, extinguished and

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satisfied the mortgages, &c. As to the mortgage reserved in the twelve months' bond, the latter not being recorded, the mortgage can have no effect. The defendants having neglected to proceed under the twelve months' bond, cannot now pursue their remedy and claim under the vendor's privilege and mortgage in virtue of the original sale, or under the judgment; or if they yet retain said rights, they must first exhaust their remedy under the twelve months' bond, before coming on the mortgaged property.

The plaintiffs further allege, that after Haslett, the original purchaser of this slave, and who purchased him in under an execution against himself for the original price, and executed his twelve months' bond with two sureties, he became insolvent, the defendants attended a meeting of his creditors, and consented to a sale of the property surrendered without the consent of the sureties in the twelve months' bond, *on a credit*, and thereby discharged them, so that the petitioners, as purchasers of the slave seized, cannot be subrogated to defendants' rights against said sureties.

They further allege, that the defendants' remedy (if any) is by ordinary action and not by executory proceeding, as their first mortgage is gone and the second is not evidenced by an authentic act, the sheriff's deed expressing that the *price* for which the slave sold under the judgment against Haslett, was *received* by the twelve months' bond, with George King as security. They aver, that they and those under whom they claim have been in possession of said slave, Randal, more than five years, under a good and legal title; they therefore plead the prescription of five years, and pray judgment in their favor, perpetuating the injunction and quieting them in their title and possession to the slave, &c.

The defendants in the injunction plead a general denial, admit the order of seizure and sale under which they seized the slave in controversy, and refer to their former suit, reported in 4 Louisiana Reports, for a detailed statement of their rights and claim against the slave, and adopt the allegations set out and made in that case by them as plaintiffs.

They claim the right to seize and sell the slave under their original mortgage, and demand the fruits of his hire from the service of the order of seizure and sale, which is enjoined. They pray for a dissolution of the injunction, and that they be permitted to proceed under the order of seizure and sale until the slave is sold and their demand satisfied, and that they have judgment for twenty per cent. in damages on the amount of the original judgment enjoined, including principal and interest.

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Judgment was rendered in favor of the defendants, dissolving the injunction and allowing them to proceed to the sale of the slave seized in the executory proceedings, and also giving ten per cent. damages for the wrongful suing out of the injunction. The plaintiffs appealed.

On the appeal the defendants prayed to have the judgment amended, so as to allow them twenty per cent. damages and hire for the slave, from the notification of the order of seizure to the plaintiffs.

Bowen, for the plaintiffs, contended, that the defendants' original mortgage was lost, because in their suit against *Haslett* for the price they claimed it, but permitted judgment to be entered *without retaining or recognizing the mortgage*, which judgment is unappealed from ; and if it had been, it is a transaction which they have agreed to, and must take it with all its consequences.

2. When a thing (as a mortgage) is claimed in a suit, and the judgment is silent as to the claim set up, it is rejected and cannot be again claimed. The judgment is *res judicata*. 7 *Martin, N. S.*, 436 to 444, and the authorities there cited.

3. The judgment is founded on a transaction.

4. The sale of the slave, *Randal*, under the execution which issued on this judgment, which was rendered for the amount due on his original price, and to give effect to the original privilege and mortgage, discharged the property both from the original vendor's privilege and mortgage, and from *that* resulting from the recording the judgment, and the title

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of the purchaser is unincumbered by either of those mortgages. 5 *Martin, N. S.*, 149 and 150. 2 *Ibid.* 234.

5. But it is objected and contended that the sale on twelve months' credit, and the twelve months' bond taken, does not discharge the judgment, and that the original debt and judgment still exists, with all their accessories, and the case of *Williams vs. Brent*, 7 *Martin, N. S.*, 217, is referred to in support of this position. The answer is, that admitting the debt with its accessories to subsist in full force, yet the property sold is discharged from it by the sale under the execution.

6. A mortgage is indivisible, and attaches, *en entière*, over and to all the property sold, and to each and every part of it. *Civil Code*, 453, article 3. *Louisiana Code*, article 3149.

7. The statute of January 28th, 1817, and the Code of Practice both require sheriffs when selling property on a credit, susceptible of mortgage, to take a special mortgage on it; which would be superfluous if the previous mortgage under which, and to satisfy which, it was sold, still existed. *Code of Practice*, 681.

8. When a seizing creditor has a privilege or mortgage payable by instalments, some of which are not due, he may demand that the property be sold for the whole debt, with the same credit for the instalments not due as was allowed in the contract. Why is this provision made, except that a sale under the first instalment would liberate the property from the subsequent ones? *Code of Practice*, 686.

9. In this case, the defendants having commenced proceedings against the original debtor and his surety, and the surety in the twelve months' bond, must exhaust their remedies against them, before attaching the property in the hands of *bonâ fide* third possessors. 7 *Martin, N. S.*, 222. *Louisiana Code*, 2157-8.

10. The defendants by giving time in the sale of Haslett's property surrendered to his creditors, without the consent of his sureties, have thereby discharged them, so that the plaintiffs cannot be subrogated to the rights of the defendants

as seizing creditors against said sureties. *Louisiana Code*, WESTERN DIST. 3030, 2157-8. 1835.

11. No vendor's privilege can be claimed under the sheriff's deed to Haslett, who purchased the property subject to the original vendor's privilege in, and gave his twelve months' bond; and none is claimed in the suit enjoined. OFFUTT ET AL. VS. HENDSLEY ET AL.

12. The receipt of the price for which the property sold is acknowledged in the sheriff's return, by taking the twelve months' bond, with a surety, and consequently the debt is novated. A receipt of a note in payment novates a debt, but not simply taking a note. 2 *Martin*, N. S., 144.

13. Another thing may be taken in payment if creditor and debtor agree. 7 *Toullier*, 66, No. 46, 33. 8 *Ibid.*, 422. 4 *Ibid.*, 11. 9 *Martin*, 562.

14. The sheriff is the agent of the creditor, and so acted in taking the twelve months' bond. 3 *Martin*, 468.

15. The sale of which the sheriff's deed is evidence, is not made by the judgment creditor, or by the owner of the property seized, but by the law; and in such a sale no vendor's privilege exists. *Civil Code*, 456, article 29. *Louisiana Code*, article 3216, No. 1, articles 2594, 2597.

16. The sheriff's deed was not duly recorded in the proper recording office, and no mortgage can result from it. The act of 1827, (2 *Moreau's Digest*, 305,) establishes an office of Recorder of Mortgages for the parish of St. Landry, where the deed should have been recorded. 6 *Merlin's Reports*, verbo *Inscription Hypothécaire*, 249, section 9. 3 *Quest. du Droit*, section 3, page 613, 616.

17. The defendants, as creditors, have no right to this property, either as owners or as standing in the place of its owner; the sale under execution is a part of their legal remedy to enforce payment of the original debt and judgment, as in case of the twelve months' bond. In this they have a mortgage and personal security—a remedy against the sheriff and his sureties, if the former fails; and a recourse on their original judgment, if the remedy fails on the twelve months' bond; but their original vendor's privilege and mortgage is extinguished and gone.

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Garland, for the defendants.

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1. The demand in this case, is based on a special mortgage reserved on the slave in question, in the original sale to Haslett, at the probate sale of the succession of Thompson, the ancestor of the defendants, in 1819. This mortgage still exists for the balance of the original price of said slave, which is now claimed with interest, fruits or hire, and damages.

2. The defendants are entitled to their remedies under the original mortgage and vendor's privilege in the sale to Haslett, on this slave. Neither of these rights are extinguished by the judgment against Haslett in 1822, because not expressly mentioned or retained in it. A release of a mortgage is not presumed; it must be express, by some act of the party, or by consent of the parties to it. 7 *Martin*, N. S. 205. *Louisiana Code*, 3335, 3341.

3. The sale under the execution which issued on the judgment, did not extinguish or impair the original mortgage or privilege, as the property was bid in by the debtor himself. 7 *Martin*, N. S. 205. 4 *Louisiana Reports*, 477.

4. Failing to record the twelve months' bond, did not impair the special mortgage given by it, as the sheriff's deed was recorded which recited the bond, and was full notice to third parties. See *Session Acts of 1817, verbo, Sales under execution*.

5. The defendants are not restricted in their remedy. There is no law which requires them to proceed on the twelve months' bond, if they choose to pursue the mortgaged property under their mortgage. *Civil Code of 1808, page 458, article 31. Acts of 1817, page 38, section 18.*

6. It is urged that Haslett made a cession of his property, and the defendants voted for a sale of his property on time, which had the effect to release their mortgage. This is denied. 1. Because it is in fact no prolongation of the term of payment. 2. If it was, it ascertained that Haslett's estate was insolvent, and was insufficient to pay debts having an anterior and higher privilege. 3. The present plaintiffs had no interest in the matter, and cannot now contest it.

7. The plaintiffs cannot in any way be subrogated to the rights of the defendants, either against the sureties in the original purchase or the twelve months' bond. On the contrary, if the sureties had and should pay, they would be subrogated to all the defendants' rights against the plaintiffs, or the mortgaged slave in their possession. *Louisiana Code, 3022, 2157. 1 Louisiana Reports, 401.*

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8. The defendants have two modes of proceeding; either in the ordinary way by suit, or by the executory process. They are the original mortgagees under an authentic act, and by a judgment and a twelve months' bond, and which import a confession of judgment. *Louisiana Code, 3362, 3373. Code of Practice, 744, 733.*

9. The plaintiffs cannot sustain the injunction, as it has not issued for any of the causes stated in the Code of Practice, or the statutory amendments.

10. The defendants are entitled to the fruits or hire of the slave Randal, which proved to be worth thirty dollars per month, from the notice of the order of seizure and sale, until he is given up. *Louisiana Code, 3371.*

11. We are entitled to have the injunction dissolved, with 20 per cent. damages, to be calculated on the principal and interest of the debt claimed, and not on the principal alone. See *Session Acts of 1831, page 102, section 3. 3 Louisiana Reports, 219; 5 Ibid. 244.*

Martin J. delivered the opinion of the court.

This suit commenced by an injunction to stay certain executory proceedings against a mortgaged slave in the possession of the plaintiffs in injunction. They are appellants from the judgment of the District Court, dissolving their injunction, staying the execution of the order of seizure and sale of the slave in question, and which the present defendants had obtained and were proceeding to execute. The latter, in their answer to the appeal, pray that the judgment appealed from, may be amended in their favor so as to allow them full damages for the detention and hire of the slave in question, which they have a right to claim.

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The facts, as exhibited in the record, so far as they are material to the case, are briefly as follow : the slave Randal, under seizure, made part of the estate of the late Wm. Thompson, deceased, former husband of the present widow Hendsley, and father of several of her minor children, all of whom are made defendants to the present injunction suit. At the probate sale of Thompson's succession, this slave was sold and purchased by Wm. Haslett, for the sum of one thousand five hundred and ten dollars; and a mortgage retained to secure payment of the purchase money. Haslett failing to pay the price, judgment was obtained, upon which execution issued; the slave in question was seized and sold, and bid in by Haslett, the judgment debtor, for one thousand two hundred and sixty-two dollars, on a twelve months' bond. Haslett subsequently sold and conveyed Randal to one Davis, who died, and this same slave was again sold at the probate sale of his succession, and purchased by Irwin; and at the sale of Irwin's succession, was purchased by Boardman, who sold to N. Offutt & brother, the present plaintiffs in the injunction.

The widow Hendsley and her children, who are the surviving widow and heirs of Wm. Thompson, deceased, obtained an order of seizure and sale, grounded on the vendor's privilege and special mortgage arising out of the first sale of the slave at the probate sale of Thompson's succession; and also, resulting from the sheriff's sale; and on the general mortgage arising from the recording of the judgment against Haslett.

It is deemed sufficient to a proper decision of this case, to confine the inquiry and direct the attention of the court to the right of the seizing creditors on the general mortgage, which their counsel contends, still remains in force and unextinguished.

The different modes by which mortgages expire or are extinguished, are detailed in the 3374th article of the Louisiana Code. The fourth mode pointed out in that article, is the extinction of the obligation of which the mortgage is the accessory. In this case, in order that the sheriff's sale might be said to have extinguished the general mortgage

resulting from Hendsley's judgment against Haslett, duly recorded, it should be shown that the sale under it has operated the extinction of the obligation flowing from the judgment itself.

The manner in which obligations are extinguished, is also treated of and detailed in the 2126th article of the Louisiana Code. Payment is first mentioned, and is the mode by which the obligation in question can only be supposed to be extinguished, if at all.

As gold and silver only can be legally tendered in the payment of debts, it follows that a twelve months' bond, taken for the price of the adjudication of property seized and sold by a creditor, produces nothing more than a bond with security and a mortgage immediately on the property sold, and it cannot, therefore, have the immediate effect of discharging or extinguishing the original obligation.

It is, however, contended, that although the sale of the slave may not have the effect of extinguishing the general mortgage under which the seizure took place, it had that of disincumbering the thing sold from the general mortgage; this court having often held that a judicial sale made to effect the payment of mortgage debts, has also the effect of transferring the property or thing sold, free and unincumbered of the mortgage with which it was burdened, in the hands of the mortgage debtor; even, when it was sold for a price which left part of the mortgage debt unpaid. This is certainly true when the property passes by a judicial sale into the hands of any other person except the mortgage debtor. In the hands of the purchaser, the purchase becomes instantly liable to all the judicial or legal mortgages with which all the rest of his property is burdened. So in the present case, when Haslett bought the slave the second time, it was immediately affected by the general mortgage resulting from the judgment, as well as by the special mortgage given in the twelve months' bond to the sheriff.

We, therefore, conclude this part of the case, by saying, that the sheriff's sale and twelve months' bond taken, did not

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Gold and silver only can be legally tendered in payment of debts. So, a twelve months' bond, taken for the price of the adjudication of property of a debtor, seized and sold by a creditor, is nothing more than a bond and security with mortgage on the property sold, and which does not discharge the original obligation or judgment.

A judicial sale made to effect the payment of mortgage debts, has also the effect of transferring the thing sold, free and unincumbered of the mortgage previously existing on it, even when sold for a less sum than that for which it was mortgaged.

When mortgaged property passes by a judicial sale into other hands, than those of the judgment debtor and mortgagor, the mortgage attaches to the price, and the purchaser takes the property free and unincumbered.

But where a slave is seized

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and sold by a judgment creditor and purchased in by the debtor, on his twelve months' bond, it becomes immediately affected by the general mortgage resulting from the judgment, as well as by the special mortgage given in the twelve months' bond to the sheriff.

So, where a debtor buys in his own property, on a twelve months' bond, it is not released from the original mortgage resulting from the judgment under which it was sold.

release, free or disincumber the slave Randal from the original mortgage resulting from the judgment.

It is further contended, that if this sale did not extinguish the general mortgage, nor disincumber the slave from its burden, it had at least the effect of suspending the exercise of the creditor's right, under the judgment, until he had exhausted all the means which the debtor had at the time of sale, in order to obtain payment; and that the vendee of the slave may resist the attempt to have the slave sold under the general mortgage, until all these means are fairly exhausted.

It is clear, Haslett, the vendor of the plaintiffs in the injunction, could not have stayed a sale on the special mortgage he gave to the sheriff in the twelve months' bond, but his vendee can. If the slave cannot be sold in the hands of the vendee, he cannot complain that this means of obtaining payment has not been exhausted.

It is urged in the next place, that the appellants, the plaintiffs in injunction as vendees of Haslett, have the right of paying his debt, and in doing so, to be subrogated to all the rights which the creditor had to compel payment from his sureties, &c.; that these rights have been impaired by an extension of credit to the principal debtor by the creditors consenting to the sale of the property surrendered by Haslett to all his creditors; and the neglect of the seizing creditors, to record the sheriff's sale, from which a special mortgage resulted.

This leads to an inquiry into the obligations of a creditor, (the subrogation of whose rights may be claimed) to preserve those rights unimpaired.

It being of the nature of the contract of suretyship, that the surety who pays, whether willing or compulsively, has a right to demand the subrogation of all the creditor's rights on his debtor, his property and his sureties. This right of subrogation is the consideration (or part of it) of the obligation which the surety contracts. There is a privity of contract between the surety and creditor, which compels the latter to preserve his rights for the former. If the preservation of

There is a privity of contract between the surety of a debtor and the creditor, which compels the latter to preserve his rights for the former.

these rights be not burdensome to the creditor, they put an end to all trouble when the day of payment arrives, by insisting on payment from the surety. No one can become surety against the creditors will, though he may against that of the debtor. The assent of the creditor is of the essence of suretyship; and no one can complain of the natural consequences of any contract into which he may enter.

A subsequent mortgagor, the vendee of a mortgagor, having an interest to discharge anterior mortgages, has the right of doing so; and in availing himself of this right to claim a subrogation of all the mortgage creditor's rights whatever, to the mortgaged property. But between these two, there is no privity of contract; they are mere volunteers; he becomes, *a posterior* mortgagor or vendee of the mortgagor, without the assent or knowledge of the creditor, and may have done so against his will. He is under no obligation to pay the creditor, and when he does pay, he must be satisfied with a subrogation to these rights as they exist.

By indulging his debtor with a delay, or in any other manner, the creditor may facilitate the payment of his debt. We cannot see that the law forbids him to do so; and to obtain some advantage for the interest of others between whom and him there is no privity of contract, and who do not incur any obligation. We cannot see how the rights of a mortgagee may be affected or put in *duriori casu*, by the circumstance of there being a second mortgagor, or the sale of the mortgaged premises; though the latter may make some difference in practice, when the mortgagor seeks to exercise his right of mortgage.

What has just been said, applies with equal force to the objection which has been taken, that the seizing creditor did not effectually pursue Haslett's sureties in the original purchase, and at the sheriff's sale.

Davis, one of the intermediate vendees between Haslett and the present plaintiffs in injunction died, and at the probate sale of his succession this same slave was sold, and purchased by Irwin. It is contended that the slave passed to the purchaser at this sale, free and unincumbered as to *all anterior*

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A subsequent mortgagor, the vendee of the original mortgagor, having an interest, may discharge all anterior mortgages, and as a matter of right, be subrogated to all the creditor's rights to the mortgaged property.

There is no privity of contract between a vendee of a mortgage and the creditor of the original mortgagor.

The original mortgagee creditor may indulge his debtor with a delay, or in any other manner to facilitate the payment of his debt, without violating the rights of a subsequent mortgagee, between whom there is no privity of contract.

A mortgage creditor having the vendor's privilege, and mortgage with personal security, and an additional mortgage by a judgment and sale of the mortgage property on a twelve months' bond, with security, may pursue either of his remedies, by seizure and sale of the property in

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the hands of a third possessor, or proceed against the sureties.

The privileges and mortgages of creditors to property sold at the probate sale of a succession, attach to the price, and the purchaser takes the thing sold free of incumbrance, when these creditors were creditors of the deceased; but if not, then their mortgages follow the property into whosoever hands it may come.

The act of 1833, relative to injunctions, *disallows* the principle established by the Supreme Court, (5 *La. Rep.*, 87,) "that a privity must exist between the party enjoining and the judgment enjoined," to entitle the party to damages.

To entitle a party to an increase of damages, for the wrongful suing out an injunction, suit must be instituted on the bond.

mortgages, and consequently as to all those under which he was seized in the present case. The object of a probate sale of a succession, is to procure money with which to pay off and discharge all the debts due by the estate, on hypothecary and chirographary claims against it. The proceeds of the sale, or price of the property sold, takes the place of the thing sold, and the mortgage or chirographary creditors exercise their rights and enforce their claims on the *proceeds*, which before the sale, they had on the things themselves. But the rights of creditors of other persons than the deceased, which follow the thing or property into his hands, remain unaffected by the sale. So the rights of the present defendants and appellees in the injunction, (who were creditors of Haslett and not of Davis) were not affected by the sale of the slave in question, at the probate sale of Davis's succession.

It appears to this court, from the view taken of the case on its merits, that the injunction was properly dissolved, but that the District Court erred, in our opinion, in allowing to the defendants any damages, except their costs.

The practice of courts in giving damages on the dissolution of an injunction, against the party obtaining it and his sureties, was unauthorised by any law, until the year 1831, (*see Session Acts, page 102.*) The statute which was then enacted, has been held and decided to be applicable only to persons who were privy to the judgment, the execution of which is enjoined. The law contemplates a privity to exist between the party enjoining, and the judgment which is enjoined. See *Borie vs. Borie, f. m. c. et al. 5 Louisiana Reports, 87.*

The legislature, however, was pleased in 1833, to disallow in future the distinction which formed the basis of the decision of this court in that case. The present defendants, cannot, therefore, avail themselves of the act of 1833, because the plaintiffs obtained their injunction before the passage of that law.

The conclusion at which the court has arrived on this point, renders an examination of the claim of the defendants to have the judgment appealed from, amended by increasing

the damages allowed to them in the first instance. This Western Dist. remedy must be sought on the injunction bond. 1835.

OFFUTT ET AL.
VS.
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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such a judgment as in our opinion ought to have been rendered in the court of the first instance, it is ordered, adjudged and decreed, that the injunction be dissolved, so as to allow the defendants to proceed with their order of seizure and sale of the slave Randal, until a sufficient sum is raised to pay the balance due to them on the original price, to wit, the sum of seven hundred and fifty-four dollars, with interest at the rate of ten per cent. per annum, from July 19th, 1829, and costs of the seizure and sale. And it is further ordered, that the costs of the court below be borne by the plaintiffs in injunction; and those of the appeal, to be paid by the defendants and appellants.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

EASTERN DISTRICT.
NEW-ORLEANS, DECEMBER, 1835.

GAILLARD vs. LABAT ET AL.

EASTERN DIST.
December, 1835.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

GAILLARD
vs.
LABAT ET AL.

In an action for the rescission of the sale of a slave as fraudulent, for alleged concealment of the vice of drunkenness, by representing her to be a good house servant, on the part of the seller, it will not be considered a case of redhibition, but one of fraud.

Whether the seller of a slave knew of the existence of the vice of drunkenness and concealed it? is a question for the Jury: and judgment rescinding the sale will be affirmed, when the verdict finding the fraud is not so unsupported by evidence, as to authorise the court to disturb it.

This is an action for the rescission of the sale of a negro woman and her daughter, on the part of the purchaser, on the ground of fraud, false representation of her qualities, and concealment of the vice of drunkenness, by the seller. The case was submitted to a jury on all the evidence adduced, who, after hearing the arguments of counsel, returned a

NOTE.—Judge Matthews was absent during this month, and did not join in any of the opinions delivered.

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December, 1835.

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verdict for the plaintiff, rescinding the sale, and restoring the slaves to the defendant, and requiring him to return the price ; and also in favor of the defendant against her warrantor ; she paying costs.

After an unsuccessful attempt to obtain a new trial, the defendant, Madame Labat, appealed.

Denis, for the appellant, contended that the verdict in this case, was against law and evidence, and that drunkenness is not a redhibitory vice, so as to authorise the rescission of the sale.

Rost, contra, and for plaintiff, urged, that in the sale of slaves, where a false representation of their qualities and characters is alleged and charged upon the seller, the question is one of fraud, and the sale only voidable on this allegation being sustained. *Louisiana Code*, 1842.

2. The present case is, therefore, merely a question of fraud, in which the jury were the proper judges, who have found against the defendant. The judgment thereon must be affirmed.

Bullard, J., delivered the opinion of the court.

The plaintiff alleges in his petition that he had purchased of the defendant, Labat, a slave named Marie Jeanne, alias Lâfille, and her daughter, named Cecilia, for the price of one thousand dollars, for which he gave his note, endorsed by his father. That the defendant and her husband, from whom she is separated of property, both knew at the time of the sale, that he wished to purchase her as a confidential house servant, and that at divers times they represented her as a first rate house servant, trusty, sober and honest. But he avers that she was, on the contrary, to the knowledge of the defendant, an habitual drunkard, both before and at the time of the sale ; that she was unworthy to be trusted and unfit to be used as a house servant, and that he was induced to purchase by the false representations and suppression of truth made by the defendant. He prays that the sale may be avoided as fraudulent, and the defendant condemned to refund the price and to pay damages.

The defendant in her answer, denied all the facts and allegations, except that she sold the slave by act, before Caire, notary public, and she calls on her warrantor, Mrs. Fitzgerald, who was thereupon made a party. The case was tried by a jury, whose verdict was in favor of the plaintiff, and also in favor of the warrantor, and the defendant appealed.

Her counsel contends that the verdict is contrary to law and evidence, and that drunkenness is not a redhibitory vice.

It appears to us, obviously, that this is not an action of redhibition, and it is, therefore, not necessary to inquire whether habitual drunkenness be, or be not such a vice as would entitle a purchaser to sustain such an action.

The plaintiff claims a rescission of the contract, not on the ground that such a habit forms a redhibitory defect in a slave, but on the alleged false assertion on the part of the defendant, of the qualities of the slave in question, on a fraudulent concealment of her vices or defects, and he relies upon article 1841 of the Louisiana Code.

That article, which treats of the nullity of agreements resulting from fraud, or the artifice of one party as to any material part of the contract, with design to obtain some unjust advantage, declares that "a false assertion of the value or cost or quality of the object, will constitute such artifice, if the object be one that requires particular skill or habit, or any difficult or inconvenient operation to discover the truth or falsity of the assertion;" and the same article enumerates among other objects, as referable to this rule, "slaves sold with a false assertion of their qualities, or a concealment of their vices or defects."

The defendant, in answer to interrogatories, admits that she represented Marie Jeanne as a good servant, but denies any knowledge of her habit of drinking to excess. The term, *good servant*, is very vague, but a house servant addicted to the habit of drunkenness, hardly deserves the epithet. Whether the defendant knew of the existence of such a habit or not, and concealed it from the plaintiff, is a question which was submitted to the jury. The habit is proved to have

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GAILLARD
vs.
LABAT ET AL.

In an action for the rescission of the sale of a slave as fraudulent, for alleged concealment of the vice of drunkenness, by representing her to be a *good house servant*, on the part of the seller, it will not be considered a case of redhibition, but one of fraud.

Whether the seller of a slave knew of the existence of the vice of drunkenness and concealed it? is a question for the jury: and judgment rescinding the sale, will be affirmed when the verdict finding the fraud is not so unsupported by evidence as to authorise the court to disturb it.

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COMPANY.**

existed both before and after the sale, and the verdict of the jury is not so unsupported by evidence, as to authorise this court to disturb it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HOFFMAN vs. PONTCHARTRAIN RAIL ROAD COMPANY.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.**

Where a balance is shown to be due by a company to A, who assigns it to B, and the latter sues for its recovery, the company cannot produce in evidence, another contract between them and A, the assignor, to show his failure to perform it, and that he owes them damages on it.

The defendant cannot set up a claim against the adverse party for unliquidated damages on a contract, in compensation of a liquidated demand.

The plaintiff sues as assignee of John Grant, to recover the sum of five hundred and two dollars from the Rail Road Company, which sum stood as a balance due Grant on the company's books, and was by him transferred to the plaintiff.

The defendants pleaded a general denial, and aver that nothing was due from them to Grant, the assignor, and that he had failed to perform any of his contracts or engagements with them, by which they had sustained damage to more than one thousand dollars.

The parish judge decided that the claim of the plaintiff resulted from an assignment made to him by John Grant, of a liquidated balance of five hundred and two dollars against

the defendants, which balance was due him for the completion of several independent and distinct contracts, and which was stated to be due him on the books of the company.

2. That the assignment from Grant to the plaintiff, was regularly and legally made.

3. That the defendants have not pleaded compensation ; and even if they had, the nature of their claim forbids its being unliquidated.

On the trial, the defendants offered in evidence a written contract of Grant, the assignor of the plaintiff, with the company to build a breakwater, in order to show that Grant had failed to comply, and that this suit was premature, by which the company had sustained damages to the amount of more than one thousand dollars ; this testimony was objected to by the plaintiff, and excluded by the court ; and the defendants took their bill of exception.

Judgment was rendered for the amount of the plaintiff's claim, and the defendants appealed.

Hoffman, in propria personâ.

Peirce, for the appellants.

Bullard, J., delivered the opinion of the court.

The plaintiff in this case, sues as assignee of John Grant, to recover of the defendants a balance of five hundred and two dollars and seventy-eight cents, alleged to be due him for services as superintendent for driving piles, making and finishing wharf, and for laying turn outs, under sundry contracts with the company.

The defendants in their answer, deny that they are indebted to John Grant, and aver that if their Secretary reported a balance in his favor, he had no authority from them to do so. They further allege, that John Grant never completed any of his contracts with them, and has thereby caused them damage to the amount of one thousand dollars.

The books of the company exhibited on trial, show a balance due to Grant, and notice to the company of the transfer, was proved.

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THE PONTCHAR-
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COMPANY.

**EASTERN DIST.
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**RATTI AND PIPON
vs.**

THEIR CRED'rs.

Where a balance is shown to be due by a company to A, who assigns it to B, and the latter sues for its recovery; the company cannot produce in evidence another contract between them and A, the assignor, to show his failure to perform it, and that he owes them damages on it.

The defendant cannot set up a claim against the adverse party for unliquidated damages on a contract, in compensation of a liquidated demand.

On the trial of the case, the defendants offered to read in evidence a contract between Grant and the company, for the construction of a breakwater, and witnesses to prove that the contract had not been completed, and that damages had been sustained, to the amount of one thousand dollars. The evidence was rejected, and a bill of exception taken. We think the Court did not err in rejecting the evidence. The contract was distinct from those upon which the plaintiff's assignor claimed a balance, and the defendants, even as against Grant, could not set up a claim for unliquidated damages, in compensation of a liquidated demand. No time was limited by the contract for the completion of the break-water, and no averment was made, much less evidence offered to show that Grant was legally in delay in relation to the fulfilment of his contract. Without such previous evidence, no damages could be recovered in a direct action against Grant.

The appellee asks this court to award him ten per cent. damages for a frivolous appeal. But we think this is not one of the cases in which we should feel authorised to inflict so severe a penalty on the appellant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

RATTI AND PIPON vs. THEIR CREDITORS.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.**

Where an order of arrest issues on the affidavit of a single creditor, imprisoning the insolvent and for the sequestration of his property, this act inures to the benefit of all the creditors.

The sequestration when once made, is irrevocable, except on payment of the debts of all the creditors.

The person of the insolvent may be discharged from imprisonment on giving security; but the penalty of the bond should be large enough to cover all the debts and to indemnify all the creditors, in case of its breach.

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The condition of the bond is, that the insolvent shall remain within the jurisdiction of the court until the definitive judgment of homologation of all the proceedings; any partial homologation will be disregarded.

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On the 11th March, 1835, the plaintiffs filed their petition, accompanied by a schedule of their debts and effects, with a list of creditors and general statement of their affairs, alleging their inability to meet their engagements, and praying for a meeting of their creditors to deliberate on their affairs. They pray that a surrender of their property be accepted, and that a discharge from their debts be granted them.

The cession of property was accepted by the judge, and a meeting of creditors ordered to be held before a notary on the 24th of March.

On the next day, F. Verrier, J. Soulet and D. Bordères, creditors of the insolvents, filed their affidavits, suggesting that the books of the insolvents were not brought into court, and that a fair surrender was not made of their property. Upon this affidavit, an order issued for the séquestration of all the property of the insolvents, and Verrier and Bordères appointed provisional syndics, on giving a security bond in the penalty of sixty thousand dollars.

On the 15th March, J. Weills, another creditor, presented his opposition and affidavit, suggesting fraud and concealment, on the part of the insolvents, and praying that they be arrested, imprisoned and deprived of the benefit of the insolvent laws. The order of arrest was granted, and the insolvents imprisoned accordingly, until they furnished security for the sum of sixty-six thousand dollars, the amount of their debts set forth in the schedule.

On the 30th March, Messrs. Verrier and Bordères, filed their opposition, suggesting fraud and the concealment of the books and persons of the insolvents from their creditors; praying that they be deprived of the benefit of the insolvent laws, and requiring them to answer on oath, interrogatories touching the state of their business and pecuniary affairs.

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The proceedings before the notary were closed on the 24th of March, and on the 4th of April were brought by the syndics into court and homologated, and an order obtained fixing the terms and ordering a sale of the ceded property.

The insolvents took a rule on the *opposing* creditors, to show cause why the order of arrest should not be set aside, or the *amount* of the security diminished, on the ground that the affidavit was insufficient, no sum being specified; that the amount of bail is excessive and not authorised by law; and that the allegations in the affidavit are untrue.

The court, after hearing the arguments of counsel, determined that the affidavits were sufficient to authorise the imprisonment of the insolvents under the 223d article of the Code of Practice, and the 9th section of the act of 1817. *Vide 2 Moreau's Dig. 426.*

2. That the declaration on oath of one or more creditors to arrest the insolvent, inures to the benefit of all the creditors.

3. According to the *Louisiana Code*, article 2170, and first section of the act of 1817, it is only by making a *bonâ fide* surrender, that the insolvent avoids imprisonment. But when he is attacked as fraudulent by one or more creditors, imprisonment, either actual or constructive, follows.

4. That the person of the insolvent represents the creditors to the whole amount of their claims, until final settlement and homologation of the proceedings.

5. The bond required of the insolvent, to obtain their enlargement in such cases as this, should be for the whole amount of the claims of the creditors; and to ascertain this amount, is to deduct from the amount of debts due, that of the property actually surrendered, making allowance for necessary costs and expenses.

6. In this case, the amount of the debts as sworn to at the foot of the *bilan*, is sixty-six thousand one hundred dollars, and the proceeds of the surrendered property, about twenty-five thousand dollars, which deducted, leaves the round sum of forty-one thousand dollars, to which the bail must be reduced.

Soulé, for the appellants, made the following points :

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1. The amount due to the creditor who obtained the order of arrest, is alone to be considered, in order to determine the amount of the security to be given.

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2. The affidavit of one creditor cannot benefit the other creditors, who do not choose to resort to the same remedy.

3. In this case, Messrs. Bordères and Verrier cannot be considered as acting for the mass of the creditors.

4. The proceedings before the notary, stand homologated for all the creditors ; except those who have made suggestions of fraud within the time restricted by law ; the bail should, therefore, be reduced to the amount of their claims only.

Canon, contra.

Martin, J., delivered the opinion of the court.

This is a case of insolvency. The insolvent debtors seek the reversal of a judgment of the Parish Court, which rejects their claim for a reduction of the sum for which a bond was required of them on their application to be discharged from imprisonment, under an order of arrest which issued on an affidavit made by one of the creditors, suggesting fraud, according to the provisions in the ninth section of the act of 1817. 2 *Moreau's Digest*, 426.

The parish judge required bail to the full amount of all the debts, according to the schedule, after deducting the value of the property surrendered.

The counsel for the insolvents, in the argument of the case, advanced the following positions and grounds :

1. The sum due to the creditor who provoked the arrest, ought alone to have been considered in fixing the amount of the security to be given.

2. The affidavit of the creditor obtaining the order of arrest, cannot be of any avail to any of the others.

3. This creditor cannot be considered as acting for the benefit of the mass of creditors.

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vs.
THEIR CRED'S.

Where an order of arrest issues on the affidavit of a single creditor, imprisoning the insolvent, and for the sequestration of his property, this act inures to the benefit of all the creditors.

The sequestration when once made is irrevocable, except on payment of the debts of all the creditors.

The person of the insolvent may be discharged from imprisonment on giving security: but the penalty of the bond should be large enough to cover all the debts and to indemnify all the creditors, in case of its breach.

The condition of the bond is, that the insolvent shall remain within the jurisdiction of the court until the definitive judgment of homologation of all the proceedings; any partial homologation will be disregarded.

4. The proceedings before the notary have been homologated as to the creditors who did not suggest fraud.

On the affidavit of a creditor, an order is to issue for the arrest of the insolvent, and the sequestration of any property he may have failed to surrender. This act is for the benefit of all the creditors, and not for that of the applicant alone: otherwise the sequestration should not be made of property, exceeding in value the amount of the debt. The sequestration when once made, is irrevocable, unless on payment of the debts of all the creditors; for all of them are interested therein.

The person of the insolvent may, indeed, be discharged from imprisonment on giving security; but as his arrest was ordered for the benefit of all the creditors; and the penalty of the bond should be large enough to secure the performance of the condition, which is to indemnify the party interested, in case of its breach. The parish judge was, therefore, correct in taking into consideration all the debts of the insolvents; and the affidavit on which the order of arrest was granted, inured to the benefit of all the creditors.

As after a *cessio bonorum*, the property of the debtor is protected from the attacks of any individual creditor on his own account, it follows that all the measures he may regularly resort to, in order to secure any part of the property, must be available and benefit the mass of the creditors.

So under the 11th section of the insolvent law of 1817, already referred to, the conviction of fraud upon the accusation of *one* creditor, has the effect to deny and preclude the insolvent debtor from the benefit of the insolvent laws of this state; and as the condition of the bond is, that the insolvent shall remain within the jurisdiction of the court, until the definitive judgment of homologation of the proceedings had, under the surrender of his property, the judge, in fixing the amount of his security, properly disregarded any *partial* homologation.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs in both courts.

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January, 1836.

MILLAUDON vs. WESTERN MARINE AND FIRE INSURANCE CO.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

MILLAUDON
vs.
WESTERN MA-
RINE AND FIRE
INSURANCE CO.

Where a policy of insurance against fire, covers fifteen thousand dollars of the property insured; and a second policy is taken out of another office on the same property, as a valued one, which is endorsed on the first policy; it cannot have the effect of putting the first office *in duriori casu*, or to convert its policy from an open to a valued one.

If a subsequent policy contain no provision in respect to prior insurances, the amount of insurable interest in it will be the same as for the first policy; for the assured may insure again and again the same property, but can recover but one indemnity, and this he may recover of the first or subsequent underwriters. Those who pay the loss, may demand a proportionable contribution from the other underwriters, who are, in this respect, sureties for each other.

Insurance on merchandise, furniture or buildings, against fire, the rules as to valuation are the same as in relation to a ship or cargo. If the policy is open in its form, the value of the interest must be proved.

The amount of interest insured in a subsequent policy, will depend on the amount insured in previous policies. A cargo valued at twelve thousand dollars, and in a second policy was insured at twenty-seven thousand five hundred dollars; there remained an unsurable interest of fifteen thousand five hundred dollars, embraced by the second insurance.

This is a case of insurance against fire, on a policy executed by the defendants the 4th of February, 1834, to W. T. Thompson, and by him transferred to the plaintiff. The latter seeks the recovery of fifteen thousand dollars, the amount insured therein, on a block consisting of five houses or tenements, destroyed by fire, as in case of a total loss.

The plaintiff alleges that said property was insured against loss or damage by fire, say on five tenements, on each building three thousand dollars, for the sum of fifteen thousand dollars for one year. That your petitioner caused a further insurance of fifteen thousand dollars to be made on said pro-

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perty, by the New-Orleans Insurance Company, valuing the same at thirty thousand dollars, of which due notice was given to the defendants. That within the period mentioned in the policy, the said buildings were totally destroyed by fire, and were worth the full sum of thirty thousand dollars for which they were insured, and he has sustained damages and loss by their destruction, to that amount. He further alleges he made the necessary preliminary proof and demanded payment, which was refused, &c. He, therefore, prays judgment for the sum of fifteen thousand dollars, with interest and costs.

The defendants denied they were indebted to the amount of the sum claimed; but that the plaintiff can only claim the amount of the actual loss or damage he had sustained by the fire and destruction of the property insured, which is nine thousand two hundred and fifty dollars, and that they have been always willing to pay that amount, which has been tendered since the institution of suit. They pray for judgment and costs.

Upon these pleadings and issues, the parties went to trial. The evidence fully showed the destruction and loss of the property insured, by fire, and its value to exceed the sum insured on it. The policies under which the property was insured in both offices, were also in evidence. The conditions and obligations imposed by them on the parties, are fully stated and set forth, in the opinion of the court.

The cause was submitted to a jury, who returned a verdict for the plaintiff, allowing him the amount claimed, and interest, from judicial demand.

The judge presiding, charged the jury that "the policy sued on was an open one, by which the defendants insured three thousand dollars on each of the five tenements. Had these tenements been destroyed before a further insurance was effected with the Orleans Insurance Company, it cannot be doubted that the defendants would have had a right to require of the plaintiff, proof that the property was worth the amount insured.

“It is questionable whether the subsequent insurance effected in the Orleans office, with the knowledge of the defendants, did not alter the first policy into a valued policy. In the policy taken out of the Orleans office, the five tenements are valued at six thousand dollars each ; and it is a proper question for the jury to decide, whether or not the knowledge given to the defendants of the insurance subsequently effected, and the endorsement made by them on their own policy, amounted to an assent on their part, and an acknowledgment of the value of the property insured. If it did, the policy of the defendants thereby assumed the character of a valued policy ; and on a valued policy, the party assured must recover, unless fraud is alleged and proved by the insurer.

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“The whole question, however, relative to the nature or description of the policy in this case, is a proper subject for the jury to examine, and if they should be of opinion that the original policy was not altered but continued the same, an open policy, they may inquire into the value of the property, and according to the evidence, fix the loss sustained by the plaintiff, and the amount for which the defendants are liable.”

The defendants excepted to the charge of the judge ; and from the judgment confirming the verdict, they appealed.

Slidell, for the plaintiff.

1. The rules regulating the contract of indemnity in fire insurances, do not differ from those which have been established in relation to marine insurances. 5 *Johnson's Reports*, 373. *Phillips on Insurance*, 320. 1 *Hall's Reports*, 111, 113.

2. This policy, if taken in connection with that of the Orleans Insurance Company, which was communicated to the defendants, is clearly a valued policy insuring fifteen thousand dollars on five stores valued at thirty thousand dollars. If taken separately, without reference to that policy, the defendants are bound, by their own showing, to pay the full amount of loss. Where a policy is valued, the underwriters are bound by it, and cannot be permitted to enter into

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an examination of value, unless upon an allegation of fraud or misrepresentation. 5 *Johnson's Reports*, 368. *Phillips on Insurance*, 304-5. 4 *Martin, N. S.*, 661. *Ibid.* 640.

3. The testimony shows the property to have been worth the full amount insured on it. This was a question of fact submitted to the jury, and the court will not disturb their verdict, unless manifestly erroneous.

Maybin, for the defendants.

1. The policy sued on is not a valued policy. Fire policies are usually, though not invariably, open policies; and the insurance effected, is simply one of indemnity for the loss actually sustained. The first policy taken out of the Orleans Insurance office, is a valued one. *Hughes on Insurance*, 310. 1 *Halp's Reports*, 42. 4 *Louisiana Reports*, 289.

2. If the policy sued on be not a valued policy, then the plaintiff can only recover the actual loss he has sustained, and no more. This is shown by the evidence to be but nine thousand two hundred and fifty dollars; as offers were made by builders, to re-build the property destroyed for eighteen thousand five hundred dollars; the defendants paying one-half.

3. The plaintiff contends, that by presenting the policy effected in the Orleans office on the same buildings, subsequently, in which they are valued at thirty thousand dollars, to the defendants and their endorsement thereon to that effect, was an assent, on their part, to that valuation, and made the policy sued on a valued policy. This inference cannot be made. The policy itself, and the 6th article of its conditions, require insurance made at any other office, to be made known to it, and that only a rateable proportion of the loss be paid. 2 *Condy's Marshall on Insurance*, 788.

4. There is no evidence that the defendants assented that the policy taken out of the Orleans office was a valued one: the endorsement gave none; the secretary who made the endorsement, gave no such assent; and the charter forbids it. Being a corporation, it could only contract in the mode prescribed by its charter. 2 *Cranch*, 166.

5. The jury allowed interest in this case, which was erroneous. *Code of Practice*, 554. 3 *Louisiana Reports*, 373. EASTERN DIST.
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Bullard, J., delivered the opinion of the court.

This is an action upon a policy of insurance against fire, subscribed by the defendants upon five tenements, three thousand dollars on each. The total loss by fire, is admitted within the time limited by the policy, and it is admitted that the value of the property greatly exceeds the amount underwritten by the defendants. The case would, therefore, be perfectly free of difficulty, independently of a second policy obtained by the plaintiff from another company for a further sum of fifteen thousand dollars, of which due notice was given to the defendants, and the second policy endorsed on the first. The defence in this case turns upon the question how far the obligations of the first insurers have been modified or changed by the second policy, according to a just interpretation of the sixth condition of the insurance, which declares that "persons insuring property at this office, must give notice of any other insurance made elsewhere on their behalf on the same, and cause such other insurance to be endorsed on their policies, in which case each office shall be liable to the payment only of a rateable proportion of any loss or damage which may be sustained, and unless such notice is given, the insured shall not be entitled to recover in case of loss."

The second insurance, by the New-Orleans Insurance Company, was on the same property or tenements, "valued at six thousand dollars each, making in all thirty thousand dollars, of which fifteen thousand dollars are insured in the Western Marine and Fire Insurance Company: this policy covers the other fifteen thousand dollars."

This last is clearly a valued policy, and according to the general principle of the law of insurance, in case of total loss, such valuation would be binding on the insurers, unless fraud be shown.

It cannot be said that the valuation by the second policy, became by notice to the first insurers binding on them, and

Where a policy of insurance against fire covers fifteen thousand dollars of the property insured, and a second policy is taken out of another office on the same property, as a valued one, which is endorsed on the first policy; it cannot have the effect of putting the first office in *duriori casu*, or to convert its po-

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licy from an open
to a valued one.

If a subsequent
policy contain no
provision in re-
spect to prior in-
surances, the a-
mount of insura-
ble interest in it
will be the same
as for the first
policy; for the
assured may in-
sure again and
again the same
property, but can
recover but one
indemnity; and
this he may re-
cover of the first
or subsequent
underwriters.

Those who pay
the loss, may de-
mand a propor-
tionable contri-
bution from the
other underwri-
ters, who are, in
this respect,
sureties for each
other.

Insurance on
merchandise,
furniture or
buildings, a-
gainst fire, the
rules as to valua-
tion are the same
as in relation to
a ship or cargo.
If the policy is
open in its form,
the value of the
interest must be
proved.

The amount of
interest insured
in a subsequent
policy, will de-
pend on the a-
mount insured in
previous poli-
cies. A cargo

converted their policy from an open to a valued one. If so, there is an end of the case, for the loss being total, and the valuation conclusive, as to the indemnity to be paid, each office would have to sustain one-half of the loss estimated at thirty thousand dollars. The second policy, clearly cannot put the first insurers *in duriori casu*, and it follows, that even in case of total loss, the first insurers would be liable only to make good the loss, if that loss really amounted to the sum subscribed by them.

The second insurers admit, by their policy, that there remained an interest in the assured, not covered by the first policy, amounting to fifteen thousand dollars. This interest is covered by them. It appears to be a settled principle, that if the subsequent policy contain no provision in respect to prior insurances, the amount of insurable interest for such policy will be the same as for the first, for the assured may insure again and again the same property, against the same risks, if he will pay the premium; but he can recover but one indemnity, and this he may recover of the first or subsequent underwriters, and those who pay the loss, may demand a proportionable contribution from the other insurers. The different underwriters are, by this means, sureties for each other. 1 *Phillips*, 326.

The same author says expressly, that in case of insurance on merchandise, furniture or buildings, against fire, the rules as to valuation, are the same as in relation to a ship or cargo; if the policy is open in its form, the value of the interest must be proved. 1 *Phillips*, 320.

If the defendants will not adopt the second insurance as to valuation, we cannot well see how they can take advantage of it for the purpose of exonerating themselves from a part of the loss for which they are clearly liable under their own policy. It appears to us, that the sixth condition applies to subsequent insurances, by which the same interest is covered as by the first, or to cases of several successive open policies on the same property, and to guard against double insurances. The same author, above cited, lays down the doctrine, under the authority of decided cases, that the amount of interest to

which a subsequent policy applies, will depend on the amount insured in the previous policies; a cargo valued in a prior policy at twelve thousand dollars, the amount insured, was valued in a second policy at twenty-seven thousand five hundred dollars. Though the whole cargo was insured in the first policy, yet there remained an insurable interest of fifteen thousand five hundred dollars for the second. Since, as the property was valued in the second policy, this excess remained over the amount previously insured. 1 *Phillips* 327.

We are, therefore, of opinion, that the defence here set up, cannot avail the defendants, and that they are liable to pay the full amount underwritten by them.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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valued at twelve thousand dollars, and in a second policy was insured at twenty-seven thousand five hundred dollars; there remained an insurable interest of fifteen thousand five hundred dollars, embraced by the second insurance.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

As a general rule, the carrier is bound to prove the casualty or *vis major* which occasioned the loss or deterioration of the property which he undertakes to convey and deliver in good condition, according to the bill of lading.

When damaged goods are delivered and received by the consignee, without objection, particularly where the damage is apparent upon simple inspection, a rigid enforcement of the rule requiring the carrier to prove the damage was occasioned by *vis major*, might operate with injustice. There is an apparent compliance on his part with the conditions of the bill of lading, and by receiving the goods the consignees become liable for the freight.

The owner or master of a vessel is not liable for damages done to deck freight, arising from the dangers and waves of the sea, and the necessary exposure of the property on deck, stowed there by the consent of the shipper.

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In relation to underwriters without special agreement, and other owners of the cargo under deck, and in cases of jettison, it is well settled that goods stowed on deck form no part of the cargo.

As between the owner of the goods and the carrier, the latter is bound by the same obligation to carry the deck freight as the rest of the cargo, save only the damages which result from its exposed situation.

This is an action by the master of the brig *Good Return*, to recover from the defendants and consignees, the sum of two hundred and forty-one dollars and sixty-two cents, the amount of freight on a cargo of cotton, shipped at the port of St. Marks, on board of said brig, and consigned to Wilcox & Fearn, in New-Orleans.

The bill of lading expressed that one hundred and ninety-seven bales of cotton were shipped in good order, on board the plaintiff's vessel, the 15th December, 1832, at St. Marks, in Florida, consigned to the defendants, they paying freight. The bales were all marked and numbered as stated in the margin of the bill of lading. It further specified that one hundred and nineteen bales were stowed under deck at one dollar and thirty-seven and a half cents per bale, and seventy-eight on deck at one dollar per bale, each being designated. The defendants received the cotton without objection. On a demand made for the freight they refused payment, on the ground that some of the cotton was wet and damaged while on board the vessel.

In their answer, the defendants admit the receipt of the cotton and refusal to pay the freight. They aver that the cotton was shipped in good order and that twenty-three bales were damaged through the negligence and fault of the master of the vessel, and for which he is liable. They claim five hundred and ninety-five dollars in reconvention for the damages sustained.

Duffy, a witness and clerk to the agent of the plaintiff, says he called on the defendants for the freight after the cotton had been received by them. That they refused payment, stating a bale was missing and that several were much damaged; and that the defendant, Wilcox, admitted that the cotton damaged formed part of the deck load.

This with the bill of lading comprised the plaintiff's testimony. The bill showed by the marks, the bales that were *under deck* and those *on deck*.

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Collins, a clerk and witness for the defendant, says he attended to the receiving a portion of the cotton. Saw several of the bales which were much damaged by salt water. Several of the hands were in the hold patching a bale which appeared in bad order. After the whole of the cotton was landed, witness had charge of it and sent twenty-three bales which were badly damaged by salt water, to be picked and re-packed, &c. He saw some of the damaged bales while they were on the stage of the vessel, and notified the officers on board of the damage. The crew stated the cotton damaged *was the deck load*. The cotton appeared to be saturated with salt water. He does not know in what part of the vessel the twenty-three damaged bales were stowed.

Other witnesses testified in substance as stated in the above. The defendants proved a loss on the damaged cotton, including expenses of picking and re-packing of three hundred and eighty-one dollars, which left one hundred and thirty-nine dollars, due the defendants, on their reconventional demand after deducting freight.

Duffy, a witness for plaintiff, being recalled, says that Mr. Wilcox stated to him that the owners and master of the brig were liable for the damage done the deck freight, and that he did not claim for any other.

This cause was first tried before the judge of the Criminal Court (Grima) acting as judge *ad interim* of the First District Court, in June, 1833. The court was of opinion, that as the bill of lading expressed the cotton to be shipped in good order, the plaintiff was responsible for the damage, as having been caused by his neglect, unless he made proof of the cause of the deterioration and that it happened without his fault. Judgment was rendered in favor of the defendants for their reconventional demand, after deducting the amount claimed for freight.

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The counsel for the plaintiff moved for a new trial on the ground that the judgment was unsupported by the law or evidence of the case.

The rule for a new trial stood over until March, 1835. At this term, his honor judge *Watts* allowed the new trial and heard the case on its merits, on the testimony taken on the first trial. Judgment was given for the plaintiff for the amount of freight claimed, after deducting thirty-five dollars for one bale of cotton missing, rejecting the reconventional demand. The defendants appealed.

This case was argued at the June term, 1835, of this court, by *Mr. Curry* for the plaintiff and by *Mr. Conrad*, for the defendants. A re-argument was had at January term, 1836.

Curry and Eustis, for the plaintiff.

1. This is an action by the master of the brig *Good Return*, to recover the freight on one hundred and nineteen bales of cotton, shipped *under deck* at one dollar thirty-seven and a half cents per bale, and seventy-nine *on deck*, at one dollar per bale, from the port of St. Marks, in Florida, to New-Orleans. The defendants are the consignees, received the cotton without objection, and resist payment on the ground that part of it was damaged.

2. The testimony shows that one of the defendants admitted the damaged cotton made part of the *deck* freight. Having received the cotton, the bill of lading specified that which was on deck and that under deck. He could easily ascertain the part of the cargo that was damaged, whether above or under deck.

3. Owners or masters of vessels are not liable for the damage or loss of the deck freight, when it is stowed there with the consent of the shipper or owner. *Dorsey et al. vs. Smith et al.*, 4 *Louisiana Reports*, 211.

4. Deck freight makes no part of the cargo; and a jettison of goods stowed on deck cannot be brought into a general average. *Abbott on Shipping*, 354. 3 *Johnson's Cases*, 178.

5. An insurance does not reach goods on deck, unless expressly mentioned. They are not considered part of the cargo. The owners of the cargo under cover ought not therefore to contribute to the jettison of the goods on deck. *3 Johnson's Cases*, 178.

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6. The defendants having received the cotton without first objecting to paying freight on account of the damaged cotton, were bound to show that the damage was occasioned by the fault and negligence of the plaintiff. This they have not done.

7. The bill of lading specified each bale *on deck*, and each bale *under deck*, so that the defendants had it in their power to ascertain precisely what part of the cargo was damaged, on simple inspection, and were bound to show that it was the *under deck* freight that was wet and damaged in order to make the plaintiff liable.

Conrad, for the defendants.

1. By the provisions of law regulating the duties and responsibility of common carriers, the plaintiff was bound to make good all damage except such as resulted from accidents, proven to have been inevitable by any degree of human foresight. *Louisiana Code*, articles 2725, 3522, No. 7. *Abbott on Shipping*, page 277. *Kent's Commentaries*, 597 to 609. *Story on Bailments*, 517, 518, 578. The burden of proving the inevitable accident which excuses his non-fulfilment of his contract lies on him. "*La responsabilité du capitaine ne cesse que par la preuve d'obstacles de force majeure*" says *Boulay-Paty, Droit Com. vol. 1, page 405*: "Il n'y a que le cas fortuit que puisse l'excuser; c'est à lui à prouver le cas fortuit." 1 *Valin*, vol. 1, page 394. "Il doit rendre la marchandise telle qu'il l'a reçue à moins que le dommage ne procède d'un accident qu'on n'a pu ni prévoir ni empêcher. 1 *Emérigon*, 377. These principles have been adopted to their fullest extent by this court. 11 *Martin*, 579. 1 *Louisiana Reports*, 349.

2. The circumstance of the cotton being shipped on deck, did not exonerate him from this responsibility. He is still bound to prove *the cause of the damage*, and that it was

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inevitable, with this difference only, that as the cotton was *by permission of the shipper*, shipped on deck, he is not responsible for damage which necessarily resulted from that mode of shipping; and the only question was one of fact, whether the shipper had consented to the goods being so shipped or not.

3. At any rate, by the bill of lading in this case (which is the contract between the parties) the master undertakes to deliver it in good order. No distinction is made as to the measure of his responsibility, between the cotton shipped on, and that shipped under deck.

Bullard, J., delivered the opinion of the court.

This is an action by the master of the brig *Good Return*, to recover the freight of a number of bales of cotton, from St. Marks to New-Orleans, and which were delivered to the defendants as consignees. The bill of lading shows that seventy-eight bales were put on deck, with the consent of the shipper, at a lower rate of freight than those which were shipped in the hold.

As a general rule, the carrier is bound to prove the casualty or *vis major*, which occasioned the loss or deterioration of the property, which he undertakes to convey and deliver in good condition, according to the bill of lading.

When damaged goods are delivered and received by the consignee without objection, particularly where the damage is apparent upon simple inspection, a rigid enforcement of the rule requiring the carrier to prove the damages occasioned by *vis major*,

The answer admits that the cotton was transported on board the brig and consigned to them, but they aver that it was put on board in good condition, and that by the fault and negligence of the plaintiff or others on board, it was delivered to them not in good condition, but on the contrary, in a damaged and unsaleable state, and they estimate the damage at five hundred and ninety-five dollars, for which sum they pray judgment against the plaintiff in reconvention.

Judgment being rendered in favor of the plaintiff for the amount of the freight, the defendants appealed.

The evidence shows, that the cotton on its arrival in New-Orleans was received without objection by the consignees, but that twenty-three bales were much wet with salt water. It was admitted by one of the defendants, that the damaged bales formed a part of the deck load. We are satisfied from all the circumstances of the case, particularly the nature and limited extent of the damage, that such was the fact; and

the only question is, whether such damage arose from accidents against which the shipper was his own insurer, by consenting that the cotton should be conveyed on deck.

Neither party has furnished us any direct and positive evidence as to the cause of the damage. As a general rule, it is undoubtedly true that the carrier is bound to prove the casualty, or *vis major*, which occasioned the loss or deterioration of the property which he undertook to convey, and to deliver in good condition, according to the terms of the bill of lading. But when the goods have been delivered and received without objection, particularly where the damage was apparent upon simple inspection, a rigid enforcement of the rule might operate a great injustice. There is an apparent compliance on the part of the carrier, with the conditions of the bill of lading; and by receiving the goods, the consignees became liable for the freight. *Abbott on Shipping*, 299.

The defendants in their reconventional demand, expressly aver that the damage was occasioned by the fault or negligence of the captain or his crew. In the absence of any positive evidence on that point, we are left altogether to the guidance of presumptions arising from the nature and extent of the damage done, and the necessary exposure of the property on deck, with the consent of the shipper. We have already said that we assume as a fact, that the damaged cotton formed a part of the deck load. The voyage was in the winter, from the port of St. Marks to New-Orleans, by the way of the Balize, and the damage such as would naturally arise from exposure to spray in the open sea. In the absence of all proof to the contrary, the presumption arising from these facts, that the damage was occasioned by dangers of the sea, for which the master is not liable, must stand. In relation to underwriters without special agreement, and in relation to other owners of the cargo under deck, in cases of jettison, it is well settled that goods stowed on deck form no part of the cargo. As between the owner and the carrier, it is otherwise, and the carrier is bound by the same obligation, as for the rest of the cargo, save only the damage which may

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might operate injustice. There is an apparent compliance on his part, with the conditions of the bill of lading; and by receiving the goods, the consignees became liable for the freight.

The owner or master of a vessel, is not liable for damage done to deck freight, arising from the dangers and waves of the sea, and the necessary exposure of the property on deck, stowed there by the consent of the shipper.

In relation to underwriters without special agreement, and other owners of the cargo under deck, and in cases of jettison, it is well settled that goods stowed on deck form no part of the cargo.

As between the owner of the goods and the carrier, the latter is bound by the same obligation to carry the deck freight as the rest of the cargo, save only the damages which result from its exposed situation.

EASTERN DIST. result from its exposed situation. In the present case, we
January 1836. think he has shown sufficient, under all the circumstances,
 to exonerate himself from liability.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

According to the provisions of the insolvent law of 1808, relative to debtors in actual custody, the creditors have a right to confront their debtor in open court, or before the judge at chambers, and if such opportunity has not been afforded them in consequence of the non-appearance of the debtor, the *court cannot grant him a discharge.*

Where a stay of proceedings is ordered, and a day fixed for the meeting of the creditors, if the debtor fails to appear, or show cause by counsel, for his non-appearance, and obtain a continuance, all the proceedings are at an end under the first order of the court.

On the 11th February, 1835, the petitioner applied for the benefit of the insolvent laws, relative to debtors in actual custody.

The judge made an order that the creditors of the petitioner be notified to appear in open court, on the 18th of March, 1835, to show cause, if any, why the insolvent should not have the benefit of the insolvent laws extended to him.

The debtor did not appear on the day fixed. Some creditors appeared, but the debtor not being present, nothing was done.

On the 20th March, one of the judgment creditors of the insolvent took a rule on him, to show cause why the stay

of proceedings ordered in the premises, should not be set aside, on the ground that the insolvent debtor failed to appear on the day ordered for a meeting of his creditors.

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In answer to the rule, the insolvent replied that he was prevented from attending a meeting of his creditors by sickness. He states, that as no opposition has been made to his discharge, he is now present in open court to take the oath and make an assignment of his property, as required by law; or if refused, that another day of meeting be appointed.

The sickness of the insolvent on the day appointed, was admitted. But the district judge considered, that as the debtor did not appear, the whole proceeding was discontinued, and the insolvent debtor loses all the benefit of it. Had the debtor shown sickness by his counsel on the day appointed, it would have been good ground to have had the cause continued, and the day of meeting postponed; but as the matter now stands, no steps can be taken on the application.

The rule was made absolute, and the insolvent debtor appealed.

McMillan, for the appellant.

1. The petitioner having surrendered his property, and no opposition having been made by the creditors, was entitled to a discharge, on making the oath and assignment required by law.

2. The circumstance of the plaintiff's illness, entitles him to the meeting of his creditors ordered for another day, if he was not entitled to a discharge.

3. One creditor could not have the proceedings set aside, without making all the creditors parties.

4. Proceedings could not be set aside, after the plaintiff had been so divested of his property as to prevent him from recovering possession of it again.

Roselius and *Mace*, contra.

Bullard, J., delivered the opinion of the court.

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This is an appeal from the judgment of the District Court, making absolute a rule taken by one of the creditors of the insolvent on him, to show cause why the stay of proceedings ordered in the premises should not be set aside, on the ground that the insolvent, Bott, did not appear at the time appointed for a meeting of his creditors in open court.

In answer to the rule, the applicant alleges that on the day fixed for the meeting of his creditors, he was unable to attend on account of sickness, and that fact is admitted. He states that as no legal opposition has been made to his discharge, he is now in open court, ready to take the oath required, and make the assignment. But if not allowed to make such assignment, he prays the court to order another day for the meeting of his creditors, at such time as the court may think proper.

The proceedings in this case took place under the act of 1808, for the relief of insolvent debtors in actual custody. According to the provisions of that act, the creditors are to be cited to appear in open court, or in chambers, on a given day. The creditors have a right on that day to examine the applicant on oath, under the direction of the court, as to every thing which relates to his affairs; and if the judge is satisfied of the regularity and fairness of his books and accounts, and two-thirds of the creditors in number and value, will consent to his discharge, he may be discharged by the court on executing an assignment for the use of his creditors, and taking an oath prescribed by the statute. If the creditors do not appear, and no cause be shown against the debtor's discharge, the court may, in its discretion, either discharge him or remand him until another day.

According to the provisions of the insolvent law of 1808, relative to debtors in actual custody, the creditors have a right to confront their debtor in open court, or before the judge at chambers, and if such opportunity has not been afforded them in consequence of the non-appearance of the debtor, the court cannot grant him a discharge.

This statute manifestly contemplates that the creditors shall have an opportunity of being confronted with their debtors in open court, or before the judge in chambers, and if such opportunity has not been afforded in consequence of the non-appearance of the debtor, it appears to us clear, that the court has no authority to grant the discharge. If in the present case the debtor had on the day appointed shown good

cause for not appearing, and asked the court for a continuance, we are not prepared to say that it ought to have been refused. But that was not done ; we, therefore, concur with the District Court in the opinion, that all proceedings were at an end under the first order of the court. But the insolvent prayed the court to order another day of meeting, at such time as the court might think proper. This, also, was refused.

We think the court did not err. If the first proceeding terminated with the non-appearance of the debtor, without showing any reasons for not appearing, contradictorily with his creditors, then, although if still in actual custody he may not have lost the right to be discharged under the statute on complying with all its requisites, yet he would be bound to proceed again, *de novo*. The twentieth section of the act in question, declares that from the time the debtor has presented his petition, all suits against him are suspended. It might lead to great abuses if an insolvent could neglect to cause notices to be given as required, and neglect to appear at the time appointed, and yet obtain from time to time a new order for citation to his creditors to appear at a future day. Such immunity against the pursuits of creditors, can only be enjoyed by a debtor who shows that he has complied with all the requisites of law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Where a stay of proceedings is ordered, and a day fixed for a meeting of the creditors, if the debtor fails to appear, or show cause by counsel for his non-appearance and obtain a continuance, all the proceedings are at an end under the first order of the court.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The article 1004 of the Code of Practice, requires that opposition should be made to an executor's or curator's account, within *three* days after filing it; but it does not prohibit the making of opposition *after the lapse* of three days, and before the final judgment of homologation of the account.

Executors are legally incapable of purchasing the property of successions administered by them, at a sale provoked by themselves, and cannot gain at the expense of the estate they administer.

Executors are responsible for all the debts in the inventory not accounted for. They are bound to collect and account for all sums due to the estate, or show due diligence to collect and failure.

After a suspensive appeal has been allowed, the court below is divested of all jurisdiction in the case.

The depositor, to be entitled to his right of privilege, must make proof of the identity of the thing deposited: for it is of the essence of deposit, that the depositary should be bound to keep the thing deposited and restore it in kind to the depositor.

A sum of money found in the store of a deceased agent, making part of a sum put into his hands to be disbursed on account of his principal, does not entitle the owner to a privilege on the succession of the deceased, as in case of a special deposit, when there is no evidence to show that this sum is the *same money* received by the deceased agent.

On the 31st of December, 1834, S. W. Nye, one of the executors of Joseph Longbottom, deceased, filed an account of the administration of himself and co-executor of the estate of said deceased, and prayed that notice be given to all concerned to make opposition according to law.

On the 10th of January, 1835, sundry oppositions were filed to said account. On the 15th of the same month, on motion of the counsel for the executors, the said account,

so far as it was not opposed, was homologated and approved by the court.

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The following extracts from the judgment of the Court of Probates shows the facts and grounds of the several oppositions, material to the case :

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“The account of the executors is opposed, 1. Because they have only credited the succession with four hundred dollars for the proceeds of the lease of the house occupied by the deceased, when the evidence shows that at the sale, S. W. Nye, one of the executors had the lease adjudicated to him for four hundred dollars, and afterwards sold it to another person for nine hundred dollars. The court considers the testamentary executor had no right to make such a speculation, and that the succession is entitled to the profit, to wit, the sum of five hundred dollars.

2. Because the executors have not credited the succession with the amount of claims against various persons, as shown by the inventory and the books of the deceased amounting to about four thousand dollars. The executors were by law, to account for every claim which the succession had against other persons. It is very probable that many could not be collected, but the duty of the executors is to make out in a satisfactory manner the impossibility of collecting them ; and by their failing to do so, they must remain liable until they account for all those which the inventory pointed out to them, as being due to the succession, to wit, four thousand eight hundred and eight dollars : having accounted for only two thousand seven hundred and fifty-three dollars, the balance for which they are still liable, is two thousand and fifty-five dollars.

3. Cotton Henry contends, that the sum of one thousand one hundred dollars, which was found in the store of the deceased, was money deposited by him with the deceased, on the eve of absenting himself from the state, and that he is entitled to claim it by privilege on the funds of the succession.

The court after carefully examining the evidence, considers,

1. “That the identity of the money is not shown or proved.
2. “That the deceased does not appear to have acted as a

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depositor of the said Cotton Henry, but as a general agent.
3. "That he is properly credited for the said sum of one thousand one hundred dollars as an ordinary creditor, and as such, cannot be entitled to a privilege."

After recapitulating the various grounds of opposition and objections to the account, the judge proceeds to adjudge and decree that for the amount of claims mentioned in the inventory and not accounted for, amounting to two thousand and fifty-five dollars, the said executors be declared indebted to the succession for that sum, reserving, however, to said executors the right of showing within ten days from the date of this judgment, by satisfactory evidence, such as the return of original notes, due bills and other titles of claims, &c. This judgment was signed on the 18th of August, 1835.

On the 29th of August an appeal was prayed by the executors, and allowed, to the Supreme Court, against the judgment on the several oppositions to the account of administration.

Two days before the appeal was taken, to wit, on the 27th of August, the executors availed themselves of the ten days allowed them in the judgment to furnish proof and account for the sums charged to them as unaccounted for, and filed an amended account, and prayed that the original judgment be amended by diminishing the sums for which they were made liable in accordance with the documents and evidence accompanying the new account.

The new account with a mass of documents vouchers and evidence comes up with the record, but there is no decision or judgment of the court thereon.

Buchanan and Culbertson, for the executors and appellants, made the following points:

1. The oppositions to the executors' account, were not filed within the legal delay of three days after filing the account in court; they therefore came too late and should have been dismissed. *Code of Practice, articles 1004, 1008.*

2. The executors were made liable for the price of a lease sold at the sale of the succession, for more than double the

amount of the sale ; this part of the judgment is erroneous and should be corrected.

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3. The executors are erroneously and illegally charged with the whole amount of the accounts standing on the books of Longbottom, and notes in the inventory, although many of these accounts and notes are shown by testimony to be not only uncollected and unpaid, but wholly unsusceptible of collection or recovery.

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McMillan, for the opposition of C. Henry, in reply.

1. The sum of one thousand one hundred dollars due this opponent, as found in the store of the deceased, should be set down as a privilege claim, and paid by preference as a special deposit, and also so as to make the executors unconditionally liable. *Louisiana Code, article 3189. 3 Louisiana Reports, 532.*

2. The judgment should also be amended so as to compel the executors to account for the lease of the store as appraised in the inventory ; and to reject such claims against said succession as are not proved by legal evidence.

Maybin, for Babcock and others, who are opponents and appellees.

Bullard, J., delivered the opinion of the court.

The testamentary executors of Joseph Longbottom, deceased, being ordered by the Court of Probates to file an account of their administration, an account and tableau were after some delay filed, to which numerous oppositions were made on various grounds, by creditors of the estate. The court, after hearing evidence and argument, gave judgment sustaining some of the oppositions and overruling others. The executors appealed.

Their counsel relies for a reversal of the judgment on the following points :

- 1st. That the oppositions to the account of the executorship were filed after the legal delay.
- 2d. That the executors are made liable for a lease at a higher rate than the same was sold for.

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The article 1004 of the Code of Practice, requires that opposition should be made to an executor's or curator's account, within three days after filing it; but it does not prohibit the making of opposition after the lapse of three days, and before the final judgment of homologation of the account.

3d. That the executors are charged with all the accounts standing on the books of Longbottom, and notes contained in the inventory, although many of these accounts and notes are shown to be not only not received by them but to be utterly bad and worthless.

In support of his first point, the counsel relies upon articles 1004 and 1008 of the Code of Practice, and upon several decisions of this court relating to the filing of opposition to the proceedings had before notaries in cases of surrender of property. The first article above mentioned requires that opposition should be made within three days after the filing of the account. But that article does not prohibit the making of opposition after the lapse of three days and before the final homologation of the account. In this respect there is an essential difference between this provision of the Code and that of the act of 1817, in relation to the filing an opposition to the proceedings before notaries. In the case of *Griffith vs. Minor*, we held, as a general rule, that "when an act is to be done within a given time, as the filing an answer and the like, it may be done afterwards if nothing occurs to prevent it. Thus, if a judgment by default has not been taken, an answer may be put in to the merits, although more than ten days have elapsed from the service of citation." 7 *Louisiana Reports*, 344.

In relation to the second point, it appears that one of the executors at the sale of the property of the estate, purchased the unexpired time of a lease at the sum of four hundred dollars and sold it soon afterwards at nine hundred. The Court of Probates condemned the executors to account for the lease at nine hundred dollars. We think he did not err.

Executors are legally incapable of purchasing the property of successions administered by them, at a sale provoked by themselves; and cannot gain at the expense of the estate they administer.

Executors are in our opinion legally incapable of purchasing the property of successions administered by them at a sale provoked by themselves, and cannot gain at the expense of the estate.

The Court of Probates charged the executors with the amount of claims mentioned in the inventory and not accounted for, and the appellants complain that injustice has been done them, because these are bad debts and cannot be

recovered. In the judgment rendered below, the right is reserved to the executors of showing within ten days the non-payment of those claims by any satisfactory evidence. This part of the judgment is highly favorable to the executors. They had notice by sundry oppositions that the creditors would endeavor to hold them liable for those debts not collected by them, or if collected, not accounted for. On the trial of the opposition, no evidence of diligence was offered by them, and in strictness they might have been rendered finally liable; but the judge, thinking a great injustice might be done them, reserved to them the right within ten days of showing by legal evidence the insolvency, of the debtors or ineffectual diligence to make collections. The executors surely have no right to complain of this part of the judgment. If by appealing within the ten days they have delayed or defeated the right reserved to them, it is their own fault. We cannot look at the evidence offered under this reservation after the judgment was pronounced, because it has not been acted on by the court below, and after a suspensive appeal had been allowed, the court below was divested of all jurisdiction in the case. We can only examine the judgment such as it was originally rendered. The appellees and opposing creditors complain of that exercise of discretion on the part of the court below, and contend strenuously that the court had no right to suspend the effect of its own judgment by reserving such a right to the defendants. The proceeding is certainly not common and perhaps not strictly correct, but the judge had a right in his discretion to set aside the judgment and award a new trial if he thought injustice had been done. In exercising his discretion, he has thought proper to reserve to the executors a right to exonerate themselves from a part of the judgment within ten days, instead of opening the whole case under its peculiar circumstances. His discretion appears to have been soundly exercised.

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Executors are responsible for all the debts in the inventory not accounted for. They are bound to collect and account for all sums due to the estate, or show due diligence to collect, and failure.

After a suspensive appeal has been allowed, the court below is divested of all jurisdiction in the case.

One of the opposing creditors and appellees, Cotton Henry, prays that the judgment below may be so amended as to allow his claim for one thousand one hundred dollars to be

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paid by privilege, as for a special deposit, that sum being found in the store of the deceased.

The evidence in the record shows that the deceased was the attorney in fact of Cotton Henry, during his absence from the State, and that before his departure he had given his agent a check on one of the banks for one thousand three hundred dollars, to be disbursed on his account, and that the sum of one thousand one hundred dollars was found in the store of the deceased at the time of his death. But there is no evidence to show that this sum is the same money received by the testator. Article 3189, relied on by the opponent, requires, in order that the depositor may exercise his right of privilege, proof of the identity of the thing deposited. It is of the essence of deposit that the depository should be bound to keep the thing deposited and restore it in kind to the depositor. In this case the money appears to have gone into the hands of Longbottom as the agent of Cotton Henry. He was bound to account for it, but not to restore it in kind. He did disburse a part of it for the use of his principal. We therefore think the court acted correctly in rejecting the opponent's claim as a privileged one.

The depositor, to be entitled to his right of privilege must make proof of the identity of the thing deposited: for it is of the essence of deposit, that the depository should be bound to keep the thing deposited and restore it in kind to the depositor.

A sum of money found in the store of a deceased agent, making part of a sum put into his hands to be disbursed on account of his principal, does not entitle the owner to a privilege on the succession of the deceased, as in case of a special deposit, when there is no evidence to show that this sum is the same money received by the deceased agent.

The same opponent makes in this court a further point, to wit, that the item for rent of the store ought to be rejected, as it is not shown to have been owing by the deceased. This does not appear to have formed any ground of opposition in the court below, and cannot be noticed here.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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ZINO
vs.
VERDELLE.

ZINO vs. VERDELLE.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

An attorney in fact, who sues in his principal's name, to recover a debt due and owing to him, is a competent witness to prove the plaintiff's demand.

Where the principal sues for the price of goods sold and delivered by his agent or attorney in fact, and thereby ratifies the sale, it is quite immaterial whether the agent had any authority to sell originally or not.

This is an action to recover from the defendant the sum of six hundred and one dollars and seventy-two cents, for merchandise sold by the plaintiff to the defendant. The petition states "that Jacques Zino is a resident of New-Orleans, and necessarily absent from the state, but represented therein by Pierre Escalon, his attorney in fact," and that the defendant "is indebted to him for goods, wares and merchandise, sold and delivered to him by the petitioner, through his agent, as above stated," &c.

The defendant denies that he is indebted to the plaintiff in any sum. 2d, He denies the power of attorney to Escalon. 3d, He denies that Escalon sold and delivered the goods on account of Zino, and pleads the prescription of one year.

On the trial the plaintiff having introduced the power of attorney referred to in the petition, offered Escalon as a witness to prove his demand. The defendant objected to his admission, on the ground that the power of attorney does not contain the authority to the agent to sell. The court sustained the objection, and the plaintiff excepted.

The court then instructed the jury, that as the plaintiff had failed to prove his demand, their verdict must be for the defendant. From this verdict and judgment thereon, the plaintiff appealed.

D. and J. Seghers, for the plaintiff and appellant.

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1. The agent was a competent and sufficient witness to prove the sale and delivery of the goods; for the power to administer goods and merchandise, implies the power of selling them. The procuration was, therefore, sufficient, to all intents and purposes.

2. The plaintiff by his petition, approves and ratifies the act of the agent. This alone is sufficient. 7 *Martin, N. S.* 592.

Canon, contra.

Bullard, J., delivered the opinion of the court.

This suit was instituted by Jacques Zino, now absent from the state, but, as is stated in the petition, represented by Pierre Escalon, his attorney in fact, to recover of the defendant the price of certain goods, wares and merchandise, which he alleges he had sold to the latter through his aforesaid agent, together with the hire of certain slaves. The defendant, in his answer, denies that he is indebted to Zino; he denies the powers of Escalon to sell as agent, and that the latter sold him any thing as Zino's agent. He further, pleads prescription.

In the progress of the trial, the plaintiff produced a power of attorney, passed before a notary, by which Escalon was constituted the agent of Zino, during his absence, with authority to manage, conduct and administer his property and affairs of every kind in the State of Louisiana: to claim and receive all kinds of property and sums of money; to give acquittances and receipts; to settle all accounts, and to sue, compromise, &c. Pierre Escalon, the agent, was then offered as a witness to prove the plaintiff's demand. His admission was opposed on the ground that the power of attorney does not contain the authority to sell. That objection being sustained by the court, the plaintiff's counsel took a bill of exceptions. The competency of the agent to testify for his principal, is too well settled to require any reference to authorities, and indeed the principle is not contested by the counsel for the defendant. And the objection to Escalon is, not that he was the attorney in fact of the plaintiff, but that he had no power to

An attorney in fact, who sues in his principal's name, to recover a debt due and owing to him, is a competent witness to prove the plaintiff's demand.

sell, as is alleged in the petition. We think the court erred in sustaining the objection to the witness. No exception was made to the manner in which the suit is brought, and we are bound to consider it as if the petition had been signed by Zino himself. He sues for the price of certain merchandise sold by his agent, and thereby necessarily adopts and ratifies the sale, and it becomes quite immaterial whether the agent had any authority, originally, to sell or not.

As the case must be remanded, it is not necessary to consider the plea of prescription.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be reversed, and the verdict set aside; and it is further ordered, that the case be remanded for a new trial, with directions to the judge not to reject Pierre Escalon, as a witness, on the ground stated in the bill of exceptions, and that the appellee pay the costs of the appeal.

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ORILLION AND
LACROIX
vs.
DESLONDE.

Where the principal sues for the price of goods sold and delivered by his agent or attorney in fact, and thereby ratifies the sale, it is quite immaterial whether the agent had any authority to sell originally or not.

ORILLION AND LACROIX vs. DESLONDE.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
OF THE SECOND PRESIDING.

The laws of Congress granting settlement or pre-emption rights, give no absolute title in themselves, but only grant a preference in purchasing from the United States government, on certain conditions prescribed, and the individual claiming a right under them, obtains a title from the government only by a compliance with all the conditions imposed.

The act of Congress, passed April 12, 1814, granting pre-emption rights to settlers, requires a part of the price of the land to be paid at the time of entering, and where this is omitted, and another purchases the government right and pays the price, even after entry but before payment of any part of the price, he will hold it.

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DESLONDE.

This is in the nature of a petitory action. The plaintiffs claim a quarter section of land lying in the parish of Iberville, under the act of Congress passed in 1814, allowing settlement rights to individuals to this quantity, under certain conditions and restrictions. The plaintiffs made their entry and filed their claims with the register the 5th of April, 1823, and paid the government price to the receiver, the 18th February, 1824, for the land in question. They allege that the defendant has taken possession of the land, and refuses to give it up; wherefore, they pray that it may be adjudged to them, and that they have judgment for delivery of the possession, and for one thousand dollars in damages for timber cut and carried away from it, and for the detention thereof, &c.

The defendant pleaded the general denial, and averred he had a good and legal title to it, having purchased it from one Joseph Hugurt, in December, 1829, by public act and for the price of seven thousand five hundred dollars. He cites Hugurt in warranty, to defend, &c.

Hugurt denies that the plaintiffs have any title to the premises in question, and sets up title in himself, by purchase from one F. Maurice, 16th September, 1812, to this tract of land, which he avers was originally derived from the Spanish government, the title of which has been recognized by the United States. That on the 18th of April, 1822, he acquired by purchase from the United States, two hundred and sixty-four acres, adjacent to and back of the said tract of five arpents front purchased from Maurice, the same being a pre-emption right, under the laws of the United States, he being the owner of the front tract. That he sold to the defendant three arpents front of the said tract, with the double concession, which comprehends a part of the original tract of two hundred and sixty-four acres, and that under the title so acquired, the defendant has a just and legal title to the land in dispute, &c.

The register of the land office, in his certificate of the entry made by the plaintiffs on the 5th of April, 1823, of the quarter section of land claimed by them, states "that on the 13th of March, 1820, N. Meriam, Esq. attorney for the heirs of Joseph Lacroix, filed in his office their claim for one hundred

and sixty acres of land, as a settlement right under the act of Congress, dated the 12th of April, 1814," &c. This is the land claimed in the present suit.

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Upon these issues and facts, the parties went to trial.

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The district judge decided that the defendant's title was superior, because Hugurt, on the 18th day of April, 1822, paid the United States government the price of a pre-emption right to a tract of two hundred and sixty-four acres of land adjacent to and back of his front tract, which was afterwards, on the 14th of December, 1822, surveyed by one of the government surveyors, and the location approved. That the settlement right under which the plaintiffs' claim, of itself gives no title, but only a right to acquire one by preference. That in this case they only entered the land in contest in April, 1823, and the receiver's receipt of payment is not dated until the 18th of February, 1824, two years subsequent to that of the defendant. Judgment was rendered in favor of the defendant, quieting him in his title.

The plaintiffs appealed.

Labauve, for the plaintiff and appellant.

1. The land in contest was entered expressly for the plaintiffs by their attorney in fact, Meriam, the 13th of March, 1820, as a settlement right, under the act of Congress passed 12th April, 1814, and the government price afterwards duly paid. The original entry was full notice to all the world of the plaintiffs' claim, and sufficient to give them a valid title to the land.

2. The plaintiffs base their claim on a payment made in April, 1822, at a time when the land was already entered for them under existing laws, and paid for within the legal delay.

3. The law of the 3d March, 1811, was repealed when the claim of the plaintiffs was entered in March, 1820, but was revived the 11th May, 1820, subsequently to the plaintiffs' entry. They had, thereby, acquired a right as owners, on paying for it within the legal delay.

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4. No subsequent law to the entry made by the plaintiffs' attorney, could affect, or impair in any manner whatever, the rights and privilege acquired under the law of the 14th April, 1814, of becoming absolute owners by paying the price within the time required by law.

A. N. and R. Ogden, for the defendants.

1. By the act of Congress, passed the 15th February, 1811, the front proprietors of land obtained a preference and pre-emption for the back land, and this right was limited to three years. See *Land Laws*, 577-8 779; and 5 *Martin*, N. S. 417.

2. The plaintiffs never complied with the requisitions of the law, to complete their title. By delaying it, they were debarred from competition after the defendant purchased the land. 6 *Martin*, N. S. 337. See *Land Laws*, page 653, for act of April 12th, 1814. *Ibid.* 631-2, for act 5th February, 1813. *Ibid.* 788, for act of 2d March, 1821.

Mathews, J., delivered the opinion of the court.

This case presents a question of title between the parties to a certain tract of land, claimed by each of them, as purchasers from the United States, under pre-emption laws passed by Congress. The plaintiffs claim as purchasers under acts granting a right of pre-emption to settlers, and the defendant by purchase made in pursuance of laws allowing the right of pre-emption to proprietors of land fronting on water courses, to an equal quantity in the rear of the land thus owned by them. Judgment was rendered for the defendant in the court below from which the plaintiffs appealed.

The laws of congress granting settlement or pre-emption rights, give no absolute title in themselves, but only grant a preference in purchasing from the United States government on certain conditions prescribed; and the individual claiming a right under them, obtains a title from the government only by a compliance with all the conditions imposed.

The decision of the case depends on a just construction of the legal effects which those different pre-emption laws must have on the claims of parties under them. They give no absolute title in themselves, but only grant a preference in purchasing from the United States; on certain conditions and limitations prescribed, and the individual claiming the right to purchase obtains title from the government only by a

compliance with the conditions imposed by law and within the time limited. The plaintiffs entered their claim to a pre-emption under settlement right during the existence of an act of congress, which authorised such entries; whether the entry was properly made and allowed does not appear. This perhaps might be presumed if all the conditions of the purchase had been complied with before the persons under whom the defendant claims made their purchase by complying with the requisites of the law under which they claimed to purchase.

The act granting pre-emptions on settlement claims, required a certain part of the sum to be paid at the time of entering such claims, as one of the conditions under which a title could be obtained from the United States. This was not done by the plaintiffs until some time after the vendors to the defendant had purchased the right of government by a full compliance with all things required by the act under which they bought.

Under these circumstances, we are of opinion that the defendant holds under a title first regularly obtained from the United States, and consequently is better than that set up on the part of the plaintiffs. See *Land Laws*, pages 631, 779, 653, 786, 788. 6 *Martin, N. S.*, 336. 5 *Ibid.*, 416. 3 *Louisiana Reports*, 59.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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CHIASSON'S
HEIR'S
vs.
DUPUY ET AL.

The act of congress April 12th, 1814, granting pre-emption rights to settlers, requires a part of the price of the land to be paid at the time of entering, and where this is omitted and another purchases the government right and pays the price, even after entry, but before payment of any part of the price, he will hold it.

CHIASSON'S HEIRS vs. DUPUY ET AL.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF IBERVILLE.

Opposition to an administrator's account may be presented and filed after the lapse of three judicial days from its rendition, and at any time before steps are taken to have it homologated by the court.

The only question presented in this case relates to the time within which oppositions may be filed to administrator's

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accounts. The facts upon which the case rests are set forth in the opinion of the court. The heirs of Chiasson appealed from the judgment of the Probate Court dismissing their opposition.

Labauve, for the plaintiffs and appellants.

1. The administrator, Dupuy, failed to render his account as ordered by the court, and when he did file it, which was nearly three years afterwards, it could be viewed in no other light than as an *ex parte* proceeding on his part, which the heirs were not bound to oppose within three judicial days after the account was filed.

2. We contend that as long as the account of the administration was not homologated, we as heirs, had a right to present and file our opposition to any items in, or to the whole of the account, *at any time*, even after the lapse of three judicial days.

3. Should this court decide that the opposition of the plaintiffs came in time, or that the defendant and appellant waived his exception to the filing it by going into an examination of the account on its merits, the case will then be fully before the court for a final judgment. If the opposition is considered as coming too late, the case should be remanded to receive the evidence offered in the court below on the examination and trial on the merits of the account, and which was rejected.

Bullard, J., delivered the opinion of the court.

In this case, it appears that the appellee, Marcel Dupuy, who had administered on the estate of V. Chiasson, deceased, was at the suit of the heirs at law ordered to render an account of his administration. This order was given on the 15th of February, 1832. An account was filed in pursuance of this order on the 3d of January, 1835. On the 14th of May following, the heirs filed an opposition in which they object specifically to numerous items in the account. In the mean time, it does not appear that any steps had been taken to obtain from the court an homologation of the account as

rendered. When the cause came on for trial, in the month of August following, the court considering that more than three judicial days had elapsed between the filing of the account and of the opposition, and that the latter came too late, declined to take it into consideration, and proceeded to homologate the account with certain corrections of errors, and the heirs appealed.

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ORY'S SYNDICS
vs.
DAVID.

We have recently had occasion to consider the question here presented, in the case of *Longbottom's executors vs. Babcock et al.*, ante 44, and we then came to the conclusion, that the opposition, although not filed within the three days, did not come too late, if nothing had been done in the mean time, to preclude the opponents. This case cannot be distinguished from that.

Opposition to an administrator's account may be filed, after the lapse of three judicial days from its rendition, and at any time before steps are taken to have it homologated by the court.

Under these circumstances, this court cannot go into the merits.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be reversed, and the cause be remanded for a new trial, with directions to the judge not to disregard the opposition filed to the account rendered on the ground that it came too late, and that the appellee pay the costs of the appeal.

ORY'S SYNDICS vs. DAVID.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A malady will be considered incurable so as to authorise the redhibitory action and rescission of the sale on the part of the purchaser, when it baffles the efforts of regular medical aid and death ensues within three days after the sale.

The claim of a purchaser for medical attendance and expenses of burial incurred in regard to a slave, the sale of which is rescinded on account of a redhibitory malady, will be allowed and paid by the seller.

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VS.
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This is an action by the syndics appointed by the creditors of J. B. Ory, a ceding debtor, to recover from the defendant the price of three slaves adjudicated to him at the sale of the property of the insolvent. The sale took place in the afternoon of the 22d January, 1834, at which a woman named Madeleine, for nine hundred and sixty dollars, Eulalie and her child Marie Louise, for one thousand and ten dollars, were adjudicated to the defendant; and on the next day were delivered into his possession.

The defendant admitted the sale and adjudication of the slaves in question, but averred that the slave Madeleine was laboring under a malady, of which she died within less than three days after the sale. That the slave Eulalie was sold as a good washer and ironer, and trusty house servant, but possessed none of those qualities, which were the chief inducements to bid for her. That she was afflicted with diseases which rendered her useless for the purposes intended by her purchaser, and so inconvenient and imperfect, that had he known it, he would not have bid for her. He avers he repeatedly offered to return her and her child to the petitioners, who refused to receive them. He, therefore, prays that the sale and adjudication to him of all these slaves, be annulled and declared void; but if sustained, as regards Eulalie and her child, that he be allowed a reduction in the price; and further, that he be allowed the sum of one hundred and fifty dollars, for medical attendance, clothing and support of her and her child; and the further sum of fifty-three dollars for medical attendance and funeral charges, incurred in consequence of the sickness and death of the slave Madeleine, &c.

The evidence showed that Madeleine fell sick of cholera on the 24th January, the day after she was delivered to the defendant by the seller, and regular medical aid immediately afforded. She died on the day following.

The defence was abandoned as to Eulalie and her child.

The district judge decided, that with regard to Madeleine, the defendant maintaining that the disease having appeared within three days immediately following the sale, it is

presumed to have existed at the time of the sale, *Louisiana Code*, 2508 ; and this presumption not being rebutted by any evidence offered by plaintiff, the rescission must of course take place. Whether redhibition applies to syndics' sales, is a point not raised on the trial, but of which there may be doubts, and which I leave to be settled in the appellate court, where the intention is expressed to take this case. If the parties see fit to raise it there, assuming that it does, the court cannot make any distinction by reason of the appearance among us, since the passage of the Code, of the new and rapid disease of Asiatic cholera.

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The defendant's counsel insists that defendant is not liable for costs, for reasons already expressed in this case : I am of opinion he is ; although defendant abandons any defence as to Eulalie and child, yet nothing appearing in the shape of any agreement, or offer to comply with his contract as to her, the court must proceed to decree, and does order, adjudge and decree, that the plaintiff recover the sum of one thousand and ten dollars, the price of the slave Eulalie and her child, Marie Louise, with interest from 2d April, 1835, at five per cent. &c., with special mortgage on the slaves, &c., and costs of suit. And it is further ordered, that the sale of the slave Madeleine be rescinded. The plaintiff appealed.

Derbigny and Deblieux, for the plaintiffs.

1. The appellants, in this case, maintain that the judgment of the District Court is erroneous, inasmuch as it denies the rescission of the sale of the slave Madeleine, on the supposition that she was attacked with cholera at the time of the sale ; this, even admitting it to have existed, was not an incurable, and therefore, not a redhibitory malady.

2. Admitting the malady to have existed, as assumed by the court below, at the time of sale, it must have been at its incipient stage, so slight as yet to have escaped the knowledge of the venders, and, as in evidence, easily curable.

3. The time of three days spoken of in the law, is given only as the time within which, if a discovery is made of any defect in a slave, it is presumed to have existed previous to

EASTERN DIST. the sale; but the sale cannot be rescinded if the defect or
 January, 1836. complaint can be easily removed or remedied.

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J. Slidell, for the defendant.

The slave Madeleine died the second day after delivery, which was on the third day after the sale to the defendant. This circumstance raises the presumption that the disease existed at the time of the sale, and is sufficient to support the redhibitory action to rescind the sale. *Louisiana Code*, 2508.

2. In this case no tender of an act of sale was made by the plaintiffs to the defendant. The latter was consequently not put *in morâ*, and is not responsible for costs. 6 *Louisiana Reports*, 154.

3. The testimony establishes payment by the defendant of charges for medical attendance and funeral expenses, incurred by the sickness and death of one of the slaves, which should have been allowed to him in the judgment of the District Court.

Martin, J., delivered the opinion of the court.

This is an action for the price of three slaves, adjudicated to the defendant at the sale of the property of the insolvent. The plaintiffs are appellants in this court, from the judgment of the first District Court, which sustained the claim of the defendant when sued, to be liberated from the payment of the price of one of the slaves in question, who died of the cholera on the third day after the sale and adjudication of said slave to the defendant.

The defendant and appellee, in his answer to the appeal, prayed to have the original judgment so amended, as to allow him the sum of fifty-three dollars, which he paid for medical services and expenses during the sickness of the slave and her burial.

The slaves mentioned in the petition, it appears, were adjudicated to the defendant in the afternoon of the 22d January, 1834, and delivered into his possession the next day thereafter. On the day following, to wit, the 24th of January, the slave in question, whose price is withheld by the

defendant, fell sick and died of cholera the 25th of the same month, notwithstanding every attention and medical attendance was afforded.

It has been contended in argument, in this case, that *cholera*, the malady of which this slave died, is not an incurable disease in its first stages. The court is of a different opinion; it considers a malady incurable, so far as to authorise the redhibitory action, when it baffles the efforts of regular medical aid, and death ensues, notwithstanding this aid is promptly administered. In this respect, the judgment in the first instance is correct, and the redhibitory action is sustained.

But the District Court, in our opinion, erred in disallowing the defendant's claim for medical attendance and the expenses of burial. The sum thus claimed, should have been deducted from that for which judgment was rendered in favor of the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed: and it is further ordered, adjudged and decreed, that the plaintiffs recover from the defendant the sum of nine hundred and fifty-seven dollars, as the balance of the price of the slave Eulalie and her child, Marie Louise, with interest at the rate of five per cent. per annum, from the 2d day of April, 1835; and that the said slaves be seized and sold for the payment of said sum, and the costs in the District Court. And it is further ordered, that the sale of the slave Madeleine be rescinded and annulled, and that the plaintiffs and appellants pay the costs of the appeal.

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A malady will be considered incurable, so as to authorise the redhibitory action and rescission of the sale on the part of the purchaser, when it baffles the efforts of regular medical aid, and death ensues within three days after the sale.

The claim of a purchaser for medical attendance and expenses of burial, incurred in regard to a slave, the sale of which is rescinded on account of a redhibitory malady, will be allowed and paid by the seller.

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PATIN vs. HER CREDITORS.

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OF THE SECOND PRESIDING.

The legal or tacit mortgage of the wife for the restoration of her paraphernal effects, attaches to the community property from the time they came into the possession of the husband. Her judgment of separation, although obtained subsequent to a mortgage given on the property by her husband, will hold it to the exclusion of the husband's mortgage creditor.

The rules of practice relating to the filing of answers to appeals in the country cases in the Eastern District, tried in New-Orleans, will be relaxed when justice requires it. They are called for trial as they stand on the docket, and if the answer is in when the case is called up, it will be heard.

Mortgages executed in New-Orleans, and not recorded in the parish where the mortgagor resides, until after he makes a surrender of his property to his creditors, cannot affect creditors and third persons, who are such at the time of the surrender.

Interest stipulated in contracts, ought to be allowed in putting these claims on the tableau of distribution of an estate; because they make a part of the debt due to the claimant.

The retention by a syndic, of any part of the property surrendered without selling enough to pay the debts of the insolvent, is improper, which should charge him with its value, and for which he is accountable to the creditors.

This is a case of insolvency. On the 13th of May, 1830, the plaintiff presented her petition and schedule, and prayed for a respite. A meeting of creditors was held on the 12th of July following, who after deliberating on her affairs, refused the respite and proceeded with the case as a forced surrender, and appointed B. Poydras de la Lande syndic. Among the articles of property included in the schedule of the insolvent, was a negress named Ismene and her two children, Lastie

and Josephine, estimated at one thousand dollars, and a gold watch at seventy-five dollars. In making sale of the property surrendered, the syndic retained these items, after selling the other property surrendered, claiming them as his own. In May, 1832, he filed a tableau of distribution, and in May, 1835, an amended one from which it appeared there was not sufficient funds to pay the debts due by the insolvent. He moreover placed himself on the tableau as a privileged creditor, for two thousand eight hundred and seventy dollars, with interest, being the amount of a judgment obtained by him against the insolvent, which he had duly recorded in the parish where she resided, on the 29th of May, 1828.

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Dubertrand, one of the creditors, opposed the tableau of distribution, and prayed to be placed thereon as a privileged creditor for two notes amounting to one thousand and eighty dollars, secured by two mortgages on several of the slaves surrendered, and among others, the slaves Ismene and Lastie, executed in May and November, 1828, before a notary in New-Orleans, but not recorded in the parish of Point Coupée, the residence of the mortgagor, until the 16th of June, 1830, after her surrender. He was placed on the tableau as a chirography creditor for the amount of these two claims. He also makes opposition to many other items in the tableau, and claims to be allowed several other claims for costs as privileged ones, together with all interest due or accruing on contracts stipulating for interest. He prays that the syndic be made liable for the amount of the property withheld by him, and that the tableaux be amended, so as to give him a privileged claim.

Messrs. Toledano & Gaillard also opposed the tableaux, on the ground that certain property surrendered was not sold and accounted for by the syndic, specifying the slaves claimed by him; and likewise contesting the validity of his claims as a creditor, at the same time asserting themselves as privileged judgment creditors of the insolvent.

Poydras de la Lande, claimed the slaves in question in virtue of a mortgage made to him by Pierre Abadie the husband of the insolvent, in June, 1822, to secure the

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payment of the sum of one thousand nine hundred and seventeen dollars, and on which he obtained judgment, in May, 1829. Execution issued on this judgment, in January, 1831, after the surrender, and the plaintiff pointed out the slaves, Ismene and her children, then in his possession as syndic, as being subject to his execution, had them sold and bought in on his account by an agent. This is the title under which he claims them.

Madame Patin obtained a judgment of separation of property from her husband, Pierre Abadie, in July, 1823, for fifteen thousand one hundred and sixty-eight dollars. It appeared in evidence that she brought ten thousand one hundred and sixty-eight dollars of this amount into marriage in 1810. In executing her judgment, the slaves, Ismene and her two children, were sold and bought in by her, in October, 1823. She continued in possession of them until she surrendered them to her creditors, in May, 1830.

The district judge decided that the claim of the syndic to the slaves in question be rejected; the claim was set up under his mortgage, executed by Abadie, the husband, before the judgment of separation by his wife; and although there may be some equity in it, the court cannot allow it in this case. The claim was not preferred by the syndic at the meeting of creditors, nor was it carried on the tableau or in any manner mentioned or referred to in the pleadings. The syndic must therefore be charged with the value of Ismene and her children and the gold watch which he has failed to account for, at their estimated value of one thousand and seventy-five dollars.

The syndic was properly placed on the tableau as a privileged creditor for the amount of his judgment against the insolvent, for two thousand eight hundred and seventy dollars, which had been duly recorded before the insolvency. Dubertrand was properly placed on the tableau as a chirography creditor only, his mortgages not having been recorded in the parish where the mortgagor resided, until after the insolvency.

Several other amendments were made in the tableaux of distribution. The syndic appealed. EASTERN DIST.
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Dubertrand, in answer to the appeal, prayed that the judgment of the District Court be amended in his favor, by allowing his claim as a privileged one, &c. This answer was filed on the 5th of January, 1836, and the cause had already been set for trial on the 7th of the same month. The court, however, took up the cases from the country, including the appeals from the fourth judicial district, in the order they stood on the docket.

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L. Janin, for the appellant contended, that the prayer for an amendment of the judgment by P. Dubertrand, comes too late. It was filed on the 5th of January, and the case was then already set for trial on the 7th. *Code of Practice, article, 890.*

2. B. Poydras de la Lande ought not to be made responsible to the creditors for the value of the slave *Ismene* and her child *Lastie*. In June, 1822, Pierre Abadie, the husband of the insolvent, and owner of these slaves, gave him a special mortgage on them for one thousand nine hundred dollars, with interest. In 1823, Madame Patin obtained a judgment of separation of property against her husband, P. Abadie, in execution of which all his property, including those slaves, was seized and adjudicated to her for seven thousand dollars. The sale mentions no mortgage. If she did not buy subject to the payment of the mortgage of B. Poydras de la Lande, there was no sale and these slaves continued to be the property of her husband. 4 *Martin, N. S.*, 154. 3 *Ibid.*, 604.

3. If she did buy them subject to this payment, then B. Poydras de la Lande had a right to take the proceeds in payment of his claim. In 1827, B. Poydras de la Lande obtained a judgment on the above mentioned mortgage claim of one thousand nine hundred dollars, and on other claims against Pierre Abadie; an execution issued under it, which was levied on the slaves in question, and they were adjudicated to B. Poydras de la Lande for nine hundred and ten dollars. They still are in his possession. By this state of

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things the court is enabled to render the same judgment as if the slaves had been sold by B. Poydras de la Lande, as syndic, and the contestation was about the application of the price.

4. The sale of 1823 cannot give any right to these slaves or their proceeds to Madame Patin. If, therefore, she had any rights to them, this must be under her mortgage for property brought into marriage. The creditors ought to have proved that she had such rights. The judgment of separation of property is posterior to B. Poydras de la Lande's mortgage, and affords no evidence of the time when Madame Patin's tacit mortgage commenced. If her claim arose from paraphernal property, she ought to have proved the date of the reception of it by the husband.; if from dotal property, she ought to have produced the marriage contract and proof that it was recorded. 1 *Martin's Digest*, 700 Besides, such a judgment rendered between husband and wife, upon the former's answers to interrogatories, is not sufficient evidence against the creditors of the husband, particularly creditors whose claims are older in date than the judgment. *De Blanc vs. Webb*, 5 *Louisiana Reports*, 82.

5. The judgment is also erroneous in so far as it allows to the syndic interest on his own claim only up to the time of the reception of funds from the estate. This reduction of interest was not claimed in the opposition; had it been, the best answer would have been the tableau of distribution of 1832, from which it appears, that the syndic, instead of applying all the funds then in his hands to his own claim, as in his capacity of mortgage creditor he was entitled to do, he distributed them rateably among all the creditors.

6. Further, if the interest on the syndic's own claims is to cease running, when he receives the funds of the estate, this can be ordered only on the supposition that he can apply those funds to his own payment. But that he is not permitted to do; he must keep them in bank, subject to the order of the court, and they are of no more use to him than to any other creditor. There is, therefore, no reason why his claims should be less favored than those of any other creditor. The

decision of the District Court would be correct only in a case in which it was proved that the funds had been applied in the above described manner.

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Cooley, for Dubertrand, the opposing creditor, in answer to the appeal, made the following points :

1. That the court below erred in not placing him on the tableau of distribution, as claimed in his opposition, as a mortgage creditor of the insolvent.

2. The court erred in not allowing interest on the amount due to this respondent, when the same was expressly stipulated to be paid in the acts of mortgage passed by the insolvent in favor of this respondent, and which are in evidence in this cause.

3. The court erred in making the syndic only liable for the price of *Ismene and children*, and also in only charging him with her price at the several periods, and according to the terms at which the other property of the insolvent was sold ; and erred in charging the said syndic with the price of the gold watch in the same manner, when the whole was estimated by the witness at its cash value at the time.

4. The court erred in not making the syndic personally responsible to all the creditors on account of his conduct in stopping the sale of the property ceded, and having never caused the balance to be sold ; and also for not accounting for a large balance due on a judgment in favor of the insolvent, which remained unsatisfied at the cession.

He, therefore, prays that the judgment of the court may be so far amended as to place this respondent on the tableau as a mortgage creditor in the first rank ; that ten per cent. interest on the amount due him by the insolvent may be allowed him from the time stipulated in the acts of mortgage mentioned, up to the filing of the said tableau of distribution ; that the said B. Poydras de la Lande may be decreed to add to the mass the value of the slave *Ismene* and her children and the gold watch, as so much *cash* received by him at the time of the sale of the other property of the insolvent ; that said syndic be decreed also to add to the mass, the balance

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due on the judgment in favor of the insolvent ; and that he be decreed to be liable to pay all the creditors of the said insolvent, in consequence of his neglects and acts, and that the said judgment otherwise be confirmed.

Mathews, J., delivered the opinion of the court.

In this case, the insolvent having obtained an order for a meeting of her creditors, on a petition in which she requested a respite. The meeting took place on the 10th of July, and the *procès verbal* of the proceedings was concluded by the officer before whom it was holden, on the 12th of the same month, wherein it appears that the respite was refused ; and this refusal terminated in a forced surrender of the insolvent's property, which was delivered into the possession of the appellant, as syndic of the estate. He proceeded to have it sold, but stopped the sale before it was all disposed of, supposing that sufficient had been sold to pay the debts, &c., retaining in his possession a female slave, named Ismene, and her children, and a gold watch, and finally claimed this property as his own, under certain pretexts of title, now urged before this court. He filed two tableaux of distribution of the funds arising from the sale of property which he caused to be made ; these funds proved to be insufficient to pay the debts of the insolvent, and several of the creditors made opposition to the manner of distribution assumed in the tableaux. From the decision rendered on these oppositions, the syndic appealed ; and his claims on the ceded property, and those of the creditor, P. Dubertrand, create the principal difficulty in the decision of the cause.

The appellant claims the slave Ismene, and her children, as his own property, in consequence of having purchased them under execution issued on a judgment which he had obtained against the husband of the insolvent. The execution did not issue on this judgment, and consequently no sale took place, until long after the appellant had taken into his possession the slave and her children (now in question) as syndic, and held them as part of the insolvent's estate. Whether this circumstance ought to be considered as conclu-

sive against his claim, need not be decided, as we are of opinion that her right and title to the property in favor of the mass of the creditors, is supported by the evidence of the case. She obtained a separation of goods from her husband, and in executing the judgment against him, Ismene and her children were sold and bought in by her. This separation, it is true, took place subsequent to the judgment under which the property was finally sold by Poydras as belonging to her husband, but for any thing which appears to the contrary, it was before that time bound by the tacit or legal mortgage of the wife. Her title is, therefore, the best, independent of the possession which accompanied it, down to a period when the appellant ought not be tolerated in opposing the rights of the creditors, his constituents, to the payment of whose debts he was bound to appropriate it, according to their legal rank and privileges.

The answer on the appeal, is made on the part of Dubertrand alone, who prays that the judgment of the court below may be so amended, as to give him the privilege of a creditor with mortgage on the price of the slave Ismene and her children, and also interest on his claim, at the rate of ten per cent. per annum, from the time it became due. This answer is objected to, as having been put in too late. It was, perhaps, not filed in strict conformity with rules prescribed by the Code of Practice, but we are of opinion, that the uniform manner in which those cases, called country cases, has been conducted, authorises some relaxation of the severity of those rules. They are always called up for trial as they stand on the docket, and generally conducted with great liberality and accommodation by the advocates: almost every thing being managed by consent, and we are unwilling to see the justice of any case perverted by unthought of technicalities.

The answer in the present instance must be received, although from the facts of the cause, it can avail the appellee but little. We assume it as true, that Madame Patin when she made the mortgages to Dubertrand, was domiciled in the parish of Point Coupée; and the facts show that they were

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The rules of practice relating to the filing of answers to appeals in the country cases in the Eastern District, tried in N. Orleans, will be relaxed when justice requires it. They are called for trial as they stand on the docket, and if the answer is in when the case is called up, it will be heard.

Mortgages executed in New-Orleans, and not recorded in the parish where the mortgagor resides, until after he makes a surrender of his property to his creditors, cannot affect creditors and third persons,

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who are such at
the time of the
surrender.

Interest stipu-
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The retention
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which he is ac-
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creditors.

not recorded in that parish until after the insolvent was com-
pelled to surrender her property. The process verbal of the
meeting of creditors which produced this surrender, was
finished on the 12th July, 1830, and there is no evidence of
the mortgage having been put on record before the 16th of
that month. The court below was, therefore, correct in
refusing the privilege claimed on these mortgages. Interest
being stipulated by the contract, ought to be allowed, and so
we presume it is by the amended tableau, being as clearly a
part of the debt due by the appellee, as the principal secured
by the contracts.

The retention of any part of the property surrendered,
without selling enough to pay the debts of the insolvent, was
certainly not a proper proceeding on the part of the syndic,
but as he is made accountable for the value of the part retained
by the amended tableau, and as no opposition seems to have
been made by the creditors generally to this decision, it must
remain undisturbed.

It is, therefore, ordered, adjudged and decreed, that the
judgment of the District Court be affirmed, with costs, to be
paid by the appellant.

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APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE OF
THE SECOND PRESIDING.

The oath of the son, as the agent of the plaintiff, is sufficient to obtain an
order of court appointing a curator, *ad hoc*, to the defendant, in a case
where suit is pending.

A curator, *ad hoc*, is to be appointed to an absentee in a suit which is
instituted and pending. The citation, in such a case, must be served on

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the curator *ad hoc*, against whom, contradictorily, the proceedings must be carried on to final judgment. EASTERN DIST.
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The 57th article of the Louisiana Code, expressly requires that a suit be first instituted and pending, before the appointment of a curator *ad hoc* is to be made.

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The agent who represents his principal in a suit, must have authority to do so, so as to allow all legal proceedings to be carried on contradictorily with him, in order to bind the principal.

The general provisions in the Code of Practice, for the appointment of curators by the Probate Courts, do not repeal the particular one requiring all courts to protect the interests of absentees in suits pending before them, by the appointment of a curator *ad hoc*.

Defects in judicial proceedings, such as want of appearance, judgment by default, or misconduct and neglect of the curator *ad hoc*, &c. can only be remedied by an appeal, and not by action of nullity.

This is an action of nullity, to annul and set aside a former judgment of the same court. In 1823, the present plaintiff recovered a tract of land from the present defendant in the parish of Point Coupée. In September, 1833, the now defendant, Cooley, filed his petition in the District Court for the parish of Point Coupée, claiming three thousand dollars, as the value of the improvements he had put on the land from which he had been evicted by the present plaintiff, Seymour; alleging in his petition, that Seymour was an absentee, residing in England, having no known agent in the state, and praying that a *curator ad hoc*, be appointed to represent and defend him in the suit.

The affidavit under which the judge appointed the curator *ad hoc*, was made by the son of the plaintiff in the suit, as his agent, and dated the 12th of September, 1833, four days before filing the petition. The order appointing him, was made on the back of the petition, and before filing it.

Cooley obtained judgment, contradictorily with the curator, *ad hoc*, against Seymour, for the sum of two thousand five hundred dollars, which was signed the 21st May, 1834.

In October, 1834, the present suit was instituted by G. Vance, as agent for Seymour, against the defendant Cooley,

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to annul his judgment, and for an injunction in the mean time, to restrain him from executing it.

The petitioner, in this case, alleges he was not legally cited, did not enter appearance, join issue, or had a regular judgment by default taken against him; that Gilbert Vance, a merchant of New-Orleans, was his known agent, and paid the taxes on his lands in Point Coupée, for the years 1831-2-3, which agency was well known to the sheriff of Point Coupée and other notable persons in said parish, and that said agent should have been cited.

He further alleges that he resides in England, and that time was not allowed from the filing of the petition and answer, and putting the cause at issue, to notify him through his agent, or curator *ad hoc*. The petition was filed the 16th September, 1833, the answer on the 19th November following, and the trial and judgment rendered on the minutes on the 25th of the same month. He prays for the annulment of the judgment, &c.

The defendant excepted to the plaintiffs right of action, and that there was no cause of nullity or grounds for an injunction, shown on the face of the papers. In his answer he pleaded the general denial, and that the plaintiff was an absentee, without a legal agent in the state to represent him; that the curator *ad hoc*, was properly appointed to represent him, who was duly cited and contested the case until judgment rendered.

Upon these issues, the parties went to trial.

Gilbert Vance, a witness for the plaintiff, says, he was since the month of June, 1830, and still is, the agent of Mr. Seymour, and has paid the taxes on his lands in Point Coupee for the years 1830-1-2 and '3. That he was not cited in the suit of Cooley against Seymour, and knew nothing of it, either from the curator *ad hoc*, or any other person, until judgment was rendered. The treasurer's receipts for the taxes paid by Vance, were also produced.

The sheriff of the parish stated, that if he had been asked, in the case of Cooley vs. Seymour, or "*if he had been called upon*

in that case to say who was the agent of Seymour, he would have said he believed Vance to be the agent."

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Other residents of the parish testified to their belief, that Vance was the agent of Seymour, when the suit of Cooley against Seymour was instituted.

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The district judge who tried the cause, remarked that the testimony of the witnesses adduced by the plaintiff in support of his allegations, was vague and unsatisfactory, and failed to make out any one of them. He attempts to show the appointment of the curator *ad hoc*, was irregular and illegal, on the ground that he had a known agent in the state. The article, 57 of the *Louisiana Code*, and 116 of the *Code of Practice*, provide for the appointment of a curator *ad hoc*, by the judge before whom the suit is brought, when the proof is insufficient to show the defendant had any known agent in the state.

Judgment was rendered in favor of the defendant. The plaintiff appealed.

Mitchell, for the plaintiff, contended that the appointment of a curator *ad hoc*, was not properly made in this case, in the manner pointed out by law.

2. It should have been shown to the judge, that Seymour was an absentee and had no known agent in the state, before he appointed a curator *ad hoc*; and also, that no curator for the administration of his property was appointed. *Louisiana Code, article 57.*

3. This should have been shown by the return of the sheriff, from which it would appear Seymour was an absentee. 6 *Martin, N. S.* 15.

4. The appointment of the curator *ad hoc*, was illegally made on the oath of T. J. Cooley, the son of the plaintiff, who alone declared that Seymour was an absentee, in which case a curator was to be appointed.

5. The order of the judge making the appointment, is illegal, being without date, written on the back of the petition before it was filed. If made before suit was instituted, it

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was too soon; because a curator *ad hoc*, to an absentee, who has no known agent, must be made by the judge before whom suit is pending. Suit must first be instituted and pending. *Louisiana Code, 57. Code of Practice, 195.*

6. We contend that Seymour had a known agent here when the curator *ad hoc*, was appointed, to wit, Vance; and that the law authorises such appointment only where there is no known agent in the state. The evidence is full to this point, that there was an agent. *Louisiana Code, 57.*

Cooley, for defendant.

1. The appointment of the curator *ad hoc*, to defend the suit against Seymour, was properly made. The law expressly requires this appointment when the suit is commenced, as it is then pending. A curator *ad hoc* must be named to defend, when the defendant is absent and has no known agent in the state, or person appointed to administer his property. *Louisiana Code, 57.*

2. The very object of the above named provision in the Code, was to enable the creditor to obtain a valid judgment against an absentee, by having a *defensor* appointed. An agent whose powers are limited or specific, and who had no authority to defend the absentee in court, could not be legally cited, was no legal obstacle to the appointment of a *curator ad hoc*; on the contrary, rendered such appointment necessary.

3. An attorney in fact, with limited or special powers, which do not include that of defending his principal in court, is not such an agent as that referred to. A person, except licensed attorneys, cannot defend another in court, without an express and specific power to that effect. *Partidas 3, title 5, laws 10, 14, 15 et seq. 8 Louisiana Reports, 112.*

4. The agent must not only be authorised to defend his principal in court, but must be known generally and publicly as such. The mere existence of an agent, who was unknown to the court, would not incapacitate it from naming a *defensor*, a curator *ad hoc*.

5. In this case, there is no legal proof of the existence of an agent, on the part of the plaintiff; or of his having the

powers requisite to defend his principal in court, or that such agent was publicly known.

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6. The only proof, if any, is by the testimony of Vance, the pretended agent. A power of attorney may be given either by public or private act, or in writing, even by letter ; but if given verbally, testimonial proof of it can only be *admitted* conformably to the title of conventional obligations ; but *there* we find no proof of a mandate or manner of proving a power of attorney.

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7. Mr. Vance has no where stated what his powers were, but that he was agent. The plaintiff was bound to show the agent was fully authorised to act in this case. He has not done so ; this action cannot, therefore, be sustained, as the first one was legal.

Martin, J., delivered the opinion of the court.

This is an action of nullity, instituted by the plaintiff to annul and set aside a judgment rendered against him, on the alleged ground that he had never been legally cited ; and that no appearance or judgment by default, had been previously had or taken in the case. There was a judgment pronounced against him, from which he has appealed to this court.

The suit in which the judgment sought to be annulled was given, was instituted under the 57th article of the Louisiana Code, on the suggestion that the defendant was an absentee, and had no known agent in the state, and that no curator had been appointed to his estate, to represent him as an absent defendant. A curator *ad hoc* was accordingly appointed by the court in which the suit was pending, contradictorily with whom, the suit was proceeded in until final judgment.

The counsel for the appellant, in this case, has contended in argument, that the judgment ought to have been annulled, because the suggestion on which the court acted, in appointing the curator *ad hoc*, was not otherwise verified than by the oath of the son of the plaintiff.

2. Because at the time of the appointment of the curator *ad hoc*, there was no suit pending.

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The oath of the son, as the agent of the plaintiff, is sufficient to obtain an order of court appointing a curator *ad hoc* to the defendant in a case where suit is pending.

A curator *ad hoc* is to be appointed to an absentee, in a suit which is instituted and pending. The citation in such a case, must be served on the curator *ad hoc*, against whom, contradictorily, the proceedings must be carried on to final judgment.

The 57th article of the Louisiana Code, expressly requires that a suit be first instituted and pending, before the appointment of a curator *ad hoc* is to be made.

The agent who represents his principal in a suit, must have authority to do so, so as to allow all legal proceedings to be carried on contradictorily with him, in order to bind the principal.

3. Because the defendant had a known agent in the state at the time.

4. Because the appointment of curators is exclusively vested, by the Code of Practice, in the Courts of Probate.

I. Suggestions on which precautionary measures are obtained at the inception of a suit, such as the arrest of the debtor, the attachment or sequestration of his property and the like, are verified, ordinarily, by the oath of the plaintiff. Where the oath for the appointment of a curator *ad hoc*, and such like conservatory acts, is made by the son of the plaintiff, it cannot be more objectionable than if made by him who is directly a party in interest.

II. The Code directs the appointment of the curator *ad hoc*, if a suit be instituted against an absentee who has no known agent in the state, to be made by the court before which the suit is pending.

As the curator *ad hoc*, is the person against whom the proceedings are to be conducted, contradictorily between him and the plaintiff, it follows as a consequence therefrom, that upon him is the citation to be served; and the construction which would require the previous citation of the party, would be the cursed one, which corrodes and destroys the text.

In the case of an attachment in which proceedings commence against the property of the debtor, he not being present, the citation is first served by advertisement affixed on the court house door; and the law provides for an appointment of an attorney to whom the process is also to be delivered.

If there be any ambiguity in the English part of this article of the Louisiana Code, providing for the appointment of a curator *ad hoc*, the doubts it may create are at once dispelled by a recourse to the French text, which expressly speaks of a suit first instituted and pending, before the appointment is to be made.

III. The judge presiding at the trial of the cause, expressed his opinion that the testimony by which the agency of Vance was attempted to be established, was vague and unsatisfactory. Be that as it may, the nature or character of the

agency was not shown to have been such as to authorise him to represent the principal in the suit, and to allow legal proceedings to be carried on under it, contradictorily with him, so as to bind the principal thereby. We agree with the counsel for the appellee, that the agent of which the Louisiana Code speaks, must be an agent of the latter description.

IV. The general provisions of the Code of Practice for the appointment of a curator by the Court of Probates, does not repeal the particular one which requires all courts to protect the interests of absentees, who may be sued before them, by the appointment of a curator *ad hoc*.

We conclude that the judge who tried the case in the first instance, did not err in refusing to annul the judgment attacked in the action of nullity, on the ground of the want of legal citation.

If a defect in the proceedings, occasioned by the want of an appearance or a judgment by default, entitle the appellant to relief at our hands, he should have sought it by an appeal. The district judge could not reverse his own judgment, on such grounds.

So of the misconduct of the curator *ad hoc*, in his neglect to ask time to consult the appellant whom he was appointed to represent and defend; this would not entitle the party complaining to a reversal of the judgment, and have the cause remanded. The remedy, in such a case, could only be sought on an appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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COOLEY.

The general provisions in the Code of Practice for the appointment of curators by the Probate Courts, do not repeal the particular one, requiring all courts to protect the interests of absentees in suits pending before them, by the appointment of a curator *ad hoc*.

Defects in judicial proceedings, such as want of appearance, judgment by default, or misconduct and neglect of the curator *ad hoc*, &c. can only be remedied by an appeal, and not by action of nullity.

CASES IN THE SUPREME COURT

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**WILCOX AND
FEARN
vs.
STEAM-BOAT
PHILADELPHIA.**

WILCOX & FEARN vs. STEAM-BOAT PHILADELPHIA.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A packet or sealed letter with bank notes enclosed, delivered by a passenger to the clerk of a steam-boat, for safe keeping, is simply a contract of deposit between *them*, in which the depository is only responsible for ordinary care.

A steam-boat is not liable for a part of a passenger's baggage, when separated from the rest; or for the contents of a sealed letter or packet when stolen, which has been delivered to a passenger on board, at any place the boat may stop.

The owner of a sealed letter or packet is under no obligation to pay for its transportation, when given to a passenger, and the steam-boat is not liable for its safe keeping.

This is an action, in which the plaintiffs seek to make the owners and master of the steam-boat Philadelphia liable for a package or sealed letter, containing the sum of three thousand eight hundred dollars in bank notes, remitted to the plaintiffs by their agent, and stolen from the custody of the person who had it in charge on board, while the boat was on her passage to New-Orleans.

The defendants deny that any package or sum of money, as alleged, was received on board their steam-boat; or if it was taken on board, it was not to be carried for hire, and they are not responsible for its safety; and further, that if said package was received on board and stolen, it was not occasioned by their negligence, and they are not liable.

The evidence showed that Huntington, the agent of the plaintiffs at Vicksburg, delivered to one Prather, who delivered to Bacon, a passenger on board the steam-boat Philadelphia, a package containing eighteen bank notes of one hundred dollars each, and two bank notes of one thousand dollars each, and a draft to be delivered to the plaintiffs at New-Orleans. Bacon put this package in the iron chest of the

steam-boat, in charge of the clerk of the boat, declaring it to contain money and valuable papers. The key of the iron chest was stolen from the clerk, and the money all taken. It appears that Bacon lost one thousand one hundred dollars of his own money, and the boat nine hundred dollars in the same way, and all by the same robbery.

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The district judge, upon this evidence, was of opinion, that the money or package was simply deposited in the iron chest, by the passenger who acted as the plaintiffs' agent in this matter, and which was received as an act of courtesy by the clerk of the boat; that the money was not to be carried for hire; and in the nature of things, steam-boat owners should not be made liable for baggage, because it is in the personal custody of the passenger.

Judgment was rendered in favor of the defendants, and the plaintiffs appealed.

Conrad, for the plaintiffs.

1. The defendants being common carriers, undertake for the safe delivery of every thing put on board their boat; and nothing can excuse them, but *vis major*, &c. By the provisions of the code they are responsible for loss, unless they show it is occasioned by accidental and uncontrollable events. Common carriers are also assimilated to inn-keepers. 2 *Kent's Commentaries*, 597. *Story's Commentaries*, Nos. 488, 510, 511. 1 *Locré*, 516. *Louisiana Code*, 2725, 3522, Nos. 7 and 19. 11 *Martin*, 579. 1 *Louisiana Reports*, 254, 349.

2. It has been urged, that as no agreement was made for compensation to be paid for the risk, no responsibility attaches. This is not the case. The authorities all agree that the rule is founded in public policy, and not on the principle of compensation, which renders the carrier or steam-boat liable for articles put on board. *Digest*, lib. 4, title 9, line 3, sec. 1. *Ibid.*, title 9, line 6. 1 *Bell's Commentaries*, 468. 2 *Kent's Commentaries*, 597, 598.

3. The common carrier, for meritorious services rendered, always has his action on a *quantum meruit*, and no particular

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agreement is necessary. *Story's Commentaries*, No. 505.
1 *Bell's Commentaries*, 475, 476. 2 *Wendall's Reports*, 327.

4. In the case before the court, the money was in the possession of a passenger, formed a part of his baggage, and consequently those who had charge of the boat, were responsible for its safe keeping. An inn-keeper might as well say he is not responsible for the luggage of his guest, because he does not receive a distinct compensation for his care. 1 *Bell's Commentaries*, 475. 2 *Kent's Commentaries*, 601.

5. The fact of this packet being placed in charge of the clerk, as an officer of the boat, whose appropriate duty it is on board of steam-boats, to take an account and deliver all merchandise on board, and to transact all business with the passengers, so far from diminishing the responsibility of the owners, tends greatly to increase it. 2 *Kent's Commentaries*, 593, 594. 2 *Bosanquet and Buller*, 416.

6. It is next contended, that the captain had received instructions not to receive money for transportation. But third persons cannot be affected by the private instructions given by the owners to the captain. 2 *Wendall*, 327. 1 *Louisiana Reports*, 536.

7. The defendants rely on the notice put up in the boat, that all passengers' baggage was at their own risk. The effect of these notices has been much discussed, and some of the most eminent judges of this country and England, regret they were ever recognised as of any validity. *Story's Commentaries*, No. 554. 1 *Bell's Commentaries*, 474.

8. But it is admitted, that for these notices to have effect, in varying the contract between the parties, the knowledge and assent of the party sought to be effected by them, must be shown. 1 *Bell's Commentaries*, 474. *Story's Commentaries*, No. 558, 560. 2 *Kent's Commentaries*, 606.

9. In this case, no such knowledge is shown to have been given. None can be presumed from the circumstance of printed rules being stuck up in the steam-boat. In fact, the whole doctrine of notices seems inapplicable to steam-boats, where passengers seldom have an opportunity of seeing

them, until their baggage is deposited on board, and the contract for freight and passage complete.

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Preston, for the defendants.

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1. The owners of the steam-boat Philadelphia, are not liable in this case, for there is no evidence of any negligence or want of that due care to their passengers, which is usually practised by prudent men. It is only for the negligence or mismanagement of the master, that renders the owners liable. This doctrine is settled by this court, and was the ancient law on this subject. 1 *Louisiana Reports*, 349, 354. 7 *Martin's Reports*, 282, 283.

2. The Supreme Court of New-York, in a very late case, decided that the master of a ship *was not* responsible, like a common carrier, for all losses which might happen, excepting only, "those by the act of God or the enemies of the country." 6 *Cowen*, 268.

3. It is urged the defendants are liable, on the ground that the money sued for, made part of the baggage or luggage of a passenger. Here we contest the fact. It made no part of the passenger's baggage, but was simply money deposited by the passenger with the clerk of the boat, for safe keeping. The owners of steam-boats are not liable for the passage money of a passenger, and to insure large sums not belonging to him, but transmitted to others. The rigor of the common law, as to common carriers, did not extend to contracts to carry passengers, nor to their luggage on board. See *Kent's Commentaries, verbo Bailment. Story's Commentaries, Ibid.*

4. To avoid being responsible for baggage, the owners of steam-boats, as in the present case, invariably give notice "that the baggage of the passengers will be at their own risk." This notice is binding, as a part of the steam-boat regulations. A contrary rule and regulation may possibly be applied to stage coaches, as with them the baggage is in the special charge and care of the carrier. Not so on board steam-boats. There the passenger brings and takes away his baggage, and has the whole control and superintendence of it on board, during the whole voyage.

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There must be judgment in this case for the defendants.

Martin, J., delivered the opinion of the court.

This is an action against the master and owners of the steam-boat Philadelphia, to recover from them the sum of three thousand eight hundred dollars, for this amount of bank notes, which were sent in a sealed packet by a passenger on board, and stolen or lost, while the boat was on her passage down the Mississippi river. The plaintiffs are appellants in this court, from a judgment rendered in the District Court, rejecting their claim. The facts of the case, as shown by the evidence, are briefly these: the steam-boat Philadelphia, while on her way down the river, stopped at Vicksburg, where one of the passengers received from the agents of the plaintiffs, a sealed packet, in which was alleged to be enclosed sundry bank notes, amounting to the sum claimed, and which was to be delivered to the plaintiffs on his arrival in New-Orleans. This letter or packet was delivered by the passenger to the clerk of the steam-boat, for safe keeping, who locked it up in an iron chest. The key was accidentally mislaid, or stolen from his pocket while he was asleep, and the letter or package stolen.

A packet or sealed letter with bank notes enclosed, delivered by a passenger to the clerk of a steam-boat, for safe keeping, is simply a contract of deposit between them, in which the depository is only responsible for ordinary care.

A steam-boat is not liable for a part of a passenger's baggage when separated from the rest; or for the contents of a sealed letter or packet when stolen, which has been delivered to a passenger on board, at any place the boat may stop.

The question presented in this case, appears to us to be simply one of deposit for safe keeping, between the passenger and clerk. This is a kind of contract, which it clearly appears, the clerk had no authority to make, on behalf of the owners or master; a contract in which the depository does not insure the safety, or become liable for the thing deposited. He promises nothing but ordinary care and diligence.

This was not the contract of a common carrier for hire, to deliver goods at a given place; for the letter or packet was to be returned to the passenger or depositor, at any time he called for it, during or at the termination of the voyage.

Neither can the defendants be considered as liable for a part of the passenger's baggage, when separated from the rest. It is impossible to admit, that the owners or master of a steam-boat are liable for the contents of a letter or sealed

package, which may be delivered to a cabin or steerage passenger, at any place the boat may stop on its way, to take in wood, freight or merchandise, or land or receive passengers. The owner of such a letter, incurs no obligation to pay any thing for the transportation of it; neither does he enable the master of the boat to exercise any control or care over it. He cannot, therefore, and neither can the boat or owners, be responsible for its safe keeping.

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The owner of a sealed letter or packet is under no obligation to pay for its transportation, when given to a passenger, and the steam-boat is not liable for its safe keeping.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

COOLEY vs. BEAUVAIS.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT.

A curator *ad hoc*, appointed by the court to an absentee, may employ counsel to defend the interests of such absentee, who is entitled to a just compensation for his services, to be paid by the absentee, whose interests he defended.

But a curator *ad hoc* has no right to obtain from the court, taking cognizance of the original action, a summary and *ex parte* order on the absentee, to whom he was appointed, to pay a particular sum as compensation for his services, to be taxed as part of the costs. The court cannot grant such order, without hearing the party condemned.

This is an action by the plaintiff, as an attorney at law, against the defendant, who was appointed by the court curator *ad hoc*, to defend an absentee residing in France, on being sued in the parish of Pointe Coupée, in an action of partition. The curator *ad hoc* employed the plaintiff as counsel, to defend the case in court, to which he had been appointed. At the final termination of the case, on motion,

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the court ordered the sum of five hundred dollars to be paid to A. Beauvais, curator *ad hoc*, and to be taxed in the costs, and paid by the absentee.

The present plaintiff claims the benefit of this allowance to the curator, as having done all the business in defending the original suit. He had judgment against the defendant Beauvais, as curator, for the sum of four hundred dollars; but with a condition, that the latter might release himself, on assigning the judgment allowing him his compensation, to be paid out of the funds of the absentee. The defendant appealed.

On the trial, the defendant's counsel excepted to the opinion of the court, refusing to examine the case on the defendant's plea, that the Probate Court, in the action of partition, had no power to appoint a curator *ad hoc*.

Cooley, in propria personâ.

1. The court below did not err in refusing to take into consideration the plea of the defendant, that the plaintiff here should have pleaded to the jurisdiction of the Probate Court, in the action of partition, in which his services were rendered. All pleas made by counsel are presumed to be done by the consent and under the direction of the client, and where any exception is waved, no matter if it is tenable or not, it is presumed to be done by consent of the party.

2. But even if the court did err in not considering the plea mentioned, the plea itself is not tenable. Courts of Probate have jurisdiction in cases of partition generally, and in some cases, an exclusive jurisdiction for that purpose. See *Code of Practice, article 924*. And even if the Probate Court had not jurisdiction, the case *was decided by the District Court*.

3. The testimony shows that the services were rendered, and that they were worth the sum of five hundred dollars; therefore the judgment should be amended in that respect.

4. The testimony will further show, that an execution issued in favor of Beauvais against Mrs. Mourain, whom he was appointed to represent, and against whom he had judgment for expenses; and also, that the same was arrested

by his own order. If he has not collected the amount, so as to pay it over to the counsel, it is clearly his own fault, for which others should not suffer.

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Mitchell, for the defendant and appellant.

1. The District Court should have examined the defendant's plea, alleging that the Probate Court was without authority to appoint him as curator *ad hoc*, as it had no jurisdiction of the original case, being an action of partition. 2 *Martin*, N. S., 1. 5 *Martin*, N. S., 551. *Code of Practice*, 924-5.

2. The fact that the original suit was transferred to the District Court, after the curator *ad hoc* was appointed, does not mend the matter. The District Court has original and exclusive jurisdiction of such cases, and was not legally seized of it by the transfer from the Probate Court, under a law providing for cases peculiarly situated. 5 *Martin*, N. S., 9.

3. The appointment of Beauvais, curator *ad hoc*, by the Probate Court, was clearly void. He had, therefore, no power to enforce the payment of the money allowed as his fee, and was not liable to pay it to the plaintiff.

Bullard, J., delivered the opinion of the court:

The Plaintiff alleges in his petition, that Madame Mourain, an absentee, being sued in an action of partition, Arnaud Beauvais was appointed by the court, her curator *ad hoc*; that the latter employed him (the plaintiff) as attorney and counsellor at law, to represent him in said suit, and to defend the same; that he did accordingly attend to the case, until final judgment was rendered. He further represents, that at the time of the final judgment in the case, the sum of five hundred dollars was allowed to the curator *ad hoc*, and taxed as a part of the costs to be paid by Madame Mourain. He avers, that his services were worth the full sum of five hundred dollars, and that the curator *ad hoc* is liable to pay him, and he prays judgment against the defendant for that amount.

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The defendant admits that he employed the plaintiff as attorney, and that he was appointed curator *ad hoc* of the absentee. He admits that the sum of five hundred dollars was allowed him, as alleged, but he denies that he ever received any part of it, and he submits to the wisdom of the court, whether he has a right, or is bound to enforce the payment of that sum against Madame Mourain. He further alleges, that the plaintiff did not make the proper defence; that he ought to have pleaded to the jurisdiction of the Probate Court, in which the action of partition was brought, and which court he avers had no jurisdiction in the premises, and no authority to appoint him curator *ad hoc*.

The District Court condemned the defendant to pay four hundred dollars, but to be released on his transferring to the plaintiff, within thirty days, all his right and interest in the judgment against Madame Mourain. The defendant appealed.

A curator *ad hoc*, appointed by the court to an absentee, may employ counsel to defend the interests of such absentee; who is entitled to a just compensation for his services, to be paid by the absentee, whose interest he defended.

But a curator *ad hoc* has no right to obtain from the court taking cognizance of the original action, a summary and *ex parte* order on the absentee, to whom he was appointed, to pay a particular sum as compensation for his services, to be taxed as part of the costs. The court cannot grant such order, without hearing the party condemned.

It is not pretended that Beauvais was originally liable, personally to pay the plaintiff for his professional services. If he afterwards became so, it must be by reason of some promise on his part, or of some act done by him, by which he was rendered responsible. No promise to pay is shown, and it only remains to inquire, whether the refusal of Beauvais to transfer to the plaintiff his interest in the judgment against Madame Mourain, or to prosecute an execution, and make the money out of her property, rendered him liable to the plaintiff.

That the defendant had a right as curator *ad hoc*, under the appointment of the court, to employ counsel, we do not doubt, and that the attorney is entitled to a just compensation for his services, to be paid by the absentee whose interest he defended, is perhaps equally clear; but it does not appear to us logical, to conclude from these premises, that the curator *ad hoc* has a right to obtain from the court taking cognizance of the original action, a summary and *ex parte* order on the absent party, to pay a particular sum as compensation for his services, to be taxed as a part of the costs, nor that the

court has a right to make such order, without hearing the party condemned. The absentee is before the court by a curator, for the purpose of defending an action of partition, and for no other purpose. In procuring such a condemnation, the curator *ad hoc* assumes to represent both parties, and in substance assents to a judgment in his own favor, against the party whose interest he is appointed to defend. The court assumes to adjudicate upon a cause of action, wholly foreign to the case before it.

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In the case of *Pontalba vs. Pontalba*, this court ruled, that a curator *ad hoc*, appointed to the absent defendant, was not entitled to be paid a fee, as taxed costs out of the property of the plaintiff, who had succeeded in his suit. The same doctrine was recognised in the case of *Hewet et al. vs. Wilson et al.* See 4 *Louisiana Reports*, 466. 7 *Ibid.*, 70.

The case now before the court, is different from either of those above referred to. In the present case it was the defendant who was condemned to pay the fee of the curator *ad hoc*, as a part of the costs.

It does not appear to us, that Beauvais was under any legal obligation to transfer to the plaintiff any interest he might have in the judgment, nor can we perceive how he has become personally liable to the plaintiff, in consequence of his declining to prosecute an execution to enforce it, nor does it well appear, how he could control an execution against his own constituent.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that there be judgment in favor of the defendant, as in case of a non-suit, with costs in both courts.

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REBOUL'S HEIRS

VS.

BEHREN ET AL.

REBOUL'S HEIRS VS. BEHREN ET AL.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
OF THE SECOND PRESIDING.

The sale of property on a twelve months' bond, does not satisfy the judgment on which the execution issued, or novate the debt. And when the property which was originally seized and sold on twelve months' credit, sells for less than the amount of the bond given at the first sale, any other property of the obligors in the bond, may be seized and sold to satisfy it.

Property held in common, cannot be sold under an execution against a part of the owners. Only the interest of the defendants in execution can be seized and sold; and an injunction, as to the rights of the other owners, will be maintained.

This suit commenced by injunction: it was instituted by three of the heirs of Louis A. Reboul, to enjoin the defendants' execution, and the sheriff from selling three-eighths part of a tract of land which they inherited from their ancestor.

Reboul, in his life-time, purchased a tract of land from G. H. Behren, for two thousand dollars, payable by two instalments in the month of February, 1824-5, with ten per cent. interest thereon, and mortgage retained on the land until complete payment. In 1828, after the death of Reboul, Behren obtained a judgment against his widow and heirs for about one thousand three hundred dollars, the balance due on said tract of land, on which execution issued, the land seized and sold, and bought in on a twelve months' bond, for one thousand three hundred and seventy-six dollars, the full amount of the judgment, interest and costs, by *one of the heirs*, who gave his mother as security in the bond. When the bond became due, execution issued and the land in question again sold, but failed to bring the amount of the bond. A *pluries fieri facias*, afterwards issued against the principal and surety in the bond, and was levied on a tract of land held

in common between these obligors in the twelve months' bond, and the other heirs of Reboul, to wit, the plaintiffs. The latter claim three undivided eighths of this land, and obtained an injunction inhibiting the plaintiff in the execution, and the sheriff from selling it.

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On the trial, the district judge who tried the cause, decided under the authority of the case of *Williams vs. Brent, 7 Martin, N. S., 205*, that the sale on twelve months' credit did not discharge the original judgment, and that, consequently, the heirs of Reboul were all bound by it, their property liable to the execution which issued on the twelve months' bond. Judgment was rendered dissolving the injunction. The plaintiffs appealed.

Labarre, for the plaintiffs and appellants.

1. We contend that the creditor must make use of due diligence to make the money on the bond, and if he is unable to do so, he must show it by the return of the sheriff; and in that case he must take out a new execution on his original judgment.

2. In the present case, it appears the creditor is pursuing property of the other heirs, on an execution on a twelve months' bond, against only one of them.

Mathews, J., delivered the opinion of the court.

In this case it appears that the defendant had obtained a judgment against the heirs of Reboul, for the price of a tract of land sold to their ancestor, part of which remained unpaid at his death. Execution issued on that judgment, and the said tract of land was seized and finally sold on a twelve months' bond, for an amount sufficient to satisfy the judgment and costs. One of the heirs was the purchaser, and gave his mother (who held property in community with them) as surety on the bond. They failed to pay the amount secured by the instrument, when it became due, and an execution issued against them, as provided for by law. The same property was levied on, but did not sell for enough to satisfy the debt. Another execution then was sued out against

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The sale of property on a twelve months' bond does not satisfy the judgment on which the execution is issued, or novate the debt. And when the property which was originally seized and sold on twelve months' credit, sells for less than the amount of the bond given at the first sale, any other property of the obligors in the bond may be seized and sold to satisfy it.

Property held in common cannot be sold under an execution against a part of the owners. Only the interest of the defendants in execution can be seized and sold; and an injunction as to the rights of the other owners will be maintained.

the obligors in the bond, and property was seized belonging jointly to them and the other heirs of Reboul, and still held in community. These heirs brought the present suit, in which they pray an injunction to prevent the sale of their interest in the property seized; this was granted, but the injunction was afterwards dissolved, and from the judgment of dissolution, they appealed.

It is true, as claimed on the part of the appellee, that the sale of the property on the twelve months' bond did not satisfy his judgment or novate the debt, and the course pursued by him to obtain satisfaction by seizing the property of the principal and surety in the bond, is correct; and their interest in the community property, may be rightfully seized and sold. But in pursuing them, he is not authorised to cause to be sold the interest of the other heirs; and had the sale proceeded without their interference, their rights to the property would not have been divested, by the mode of proceeding adopted in the present instance, the execution being against the parties to the bond on whom it operated as a judgment. The plaintiff in execution, should he fail to obtain his debt from these parties, may resort for redress to all the heirs of Reboul on his original judgment in the manner prescribed by law, the sale on credit being neither satisfaction nor novation. See the case of *Williams vs. Brent*, 7 *Martin*, N. S. 217-18. But in our opinion, he has no right to touch the property of the other heirs in the present mode of proceeding. The judgment of the court below is, therefore, erroneous in dissolving the injunction absolutely. The sheriff ought to have been suffered to proceed to sell the interest in the property seized, of the principal and surety to the bond, reserving that of the plaintiffs in the present suit for future investigation.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled, and it is further ordered, adjudged and decreed, that the injunction be reinstated and maintained, so far as the plaintiffs and appellants are interested in the property seized, until the rights and claims of the obligors in the twelve months'

bond be sold, as directed by the writ of execution; reserving to the defendant and appellee, his right to pursue on the original judgment, should he fail to obtain satisfaction in the present mode of pursuit, and that the appellee pay the costs of this appeal.

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GARCIA ET AL.
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GARCIA & BUYO vs. THEIR CREDITORS.

RULE ON THE PARISH JUDGE FOR THE PARISH AND CITY OF NEW-ORLEANS,
AND FOR A MANDAMUS, COMMANDING HIM TO ALLOW AN APPEAL.

A *mandamus* will not be awarded to compel the judge *a quo* to grant an appeal, from an order or interlocutory judgment, overruling exceptions to the right of a creditor to file an opposition to proceedings in insolvency.

An appeal does not lie to an order allowing an opposition to be filed, when the final action of the court may render the appeal unnecessary.

This is an application for a *mandamus* to compel the judge of the Parish Court, for the parish and city of New-Orleans, to allow an appeal from an order of court admitting an opposition to the proceedings in insolvency to be filed, charging one of the insolvent debtors with fraud.

D. Seghers, of counsel for the insolvents, resisted the filing of the opposition, and excepted to it on the ground that it was not sworn to by the opposing creditor, and did not contain that written deposition which is contemplated by the provisions of the insolvent law of 1817. The exceptions were overruled by the judge presiding and the opposition permitted to be filed.

The counsel for the insolvents prayed an appeal, which was refused. An affidavit being filed in this court by D. Seghers, stating that the judgment might work an irreparable injury to the insolvents, a rule was taken on the Hon. C. Maurian,

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parish judge, to show cause why a *mandamus* should not issue commanding him to allow the appeal in this case as prayed for.

The judge showed for cause, *first*, that according to law an appeal lies only in two cases, to wit : 1. On final judgments. 2. On interlocutory judgments, when they work an irreparable injury to the party complaining.

1. The judgment complained of is not a final judgment.

2. It is an interlocutory judgment, or rather an order which does not and cannot work an irreparable injury to the insolvents.

D. Seghers, for the *mandamus*, argued in support of the rule.

Martin, J., delivered the opinion of the court.

This is an application for a *mandamus* to the parish judge for the parish and city of New-Orleans, to show cause why it should not issue, commanding him to allow an appeal in this case. The judge in his answer, states that the judgment or order from which the appeal is prayed, is not such a one as the law authorises ; that it is only at most an interlocutory judgment, which does not and cannot work an irreparable injury to the party complaining.

A *mandamus* will not be awarded to compel the judge *a quo* to grant an appeal, from an order or interlocutory judgment, overruling exceptions to the right of a creditor, to file an opposition to proceedings in insolvency.

In examining the facts of the case, it appears that one of the creditors filed an opposition to the homologation of the proceedings in the case of insolvency, and preferred an allegation of fraud against one of the insolvent debtors. Exceptions were pleaded to the opposition and the right to file it denied, on the ground that it was not sworn to, according to the act of 1817, prescribing the mode of making oppositions. The exceptions were overruled and the right to file the opposition sustained. From this decision the party has sought an appeal to this court.

An appeal does not lie to an order allowing an opposition to be filed, when the final action of the court may render the appeal unnecessary.

This is a matter which involves the legality of an order or interlocutory judgment, which is only preliminary in the trial of the cause, and in which it is evident that the future action of the Parish Court may render an appeal unnecessary. But if it should not be the case, and injury ensue, the insolvents

will not be debarred the privilege of obtaining redress, by the final decision on the opposition, and to show that the exceptions were improperly overruled.

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The rule is, therefore, discharged.

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FENN vs. RILS.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
OF THE SECOND PRESIDING.

When the owner of property seized in execution, becomes the purchaser at twelve months' credit on his bond, he acquires no new title or right. As to him it is not legally a sale, but merely a means by which the creditor acquires additional security.

A sale where the debtor buys in his property on a twelve months' bond, does not cut off previous incumbrances as relates to the debtor himself, nor is his previous title or possession changed by the adjudication.

So, where A sold B one third of a lot of ground by private act, which was seized by a creditor of A, before the act was made authentic and recorded, and by him (i. e. A.) bought in on his twelve months' bond: *Held*, that a sale of this property to C, under execution issuing on the twelve months' bond of A, was invalid: *Held*, also, that the sale from A to B took effect as to third persons, from the time it was recorded, saving the rights such persons had, in the mean time, acquired in or to the property.

If A sells property of which he is not the owner, and he afterwards acquires title, that title vests at once in his vendee.

This is an action of partition, in which the plaintiff claims the one undivided third part of a lot of ground in the possession of the defendant, who claims the entire lot under a sheriff's sale. The facts and pleadings of the case, and evidence of the respective claims of the parties are fully stated in the opinion of the court.

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The District Judge who tried the cause, was of opinion, that the first seizure of the lot in question being made by a creditor of the plaintiff's vendor, before the act of sale from the debtor to the plaintiff was made authentic and duly recorded, created a privilege under the article 722 of the Code of Practice, which enacts, that "the seizure of immoveable property under execution creates a privilege in favor of the seizing creditor, and that it made the property liable to the execution issuing on the twelve months' bond."

Judgment was rendered in favor of the defendant with costs. The plaintiff appealed.

Stacy, for the plaintiff, filed the following points :

1. The facts of this case seem to warrant a different judgment than was given by the judge *a quo*. The law arising on these, shows that the plaintiff ought to recover. The facts are, that Weatherly, being the owner of a lot of ground in Plaquemine, on the 22d of December, 1832, sold for cash, by *private act*, one undivided third part of it to Fenn, the plaintiff, and on the 6th of August, 1833, the parties to the private act acknowledged it before the parish judge and two witnesses, and had it duly recorded. This is the plaintiff's title.

2. On the 23d of June, 1833, the *whole* of this lot was seized by a creditor as the property of Weatherly, on several judgments against him, but not recorded. On the 8th of August the lot was offered for sale by the sheriff, and bought in by Weatherly, on his twelve months' bond. No mortgage was reserved on the property sold, in the sheriff's deed of sale. On the 22d of October, 1834, the twelve months' bond not being paid, the property was again seized and sold to satisfy it, when the defendant, Rils, became the purchaser of the entire lot for one thousand two hundred dollars. This is the title under which he claims.

3. These facts show that the plaintiff's title was perfected by authentic act the 6th of August, 1833, before the first sale, which gave effect, as between the parties to the private act from its date, as an authentic act. *Louisiana Code, 2239.*

4. Weatherly, by his purchase at the sheriff's sale, on the 8th of August, 1833, only acquired the rights in and to this property, which he had not previously sold and still remaining, to wit, two undivided thirds.

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5. The defendant, Rils, who purchased at the last sale, was neither a third party or creditor of Weatherly, at the time of the sale to the plaintiff of one third of the lot in question. 1 *Martin, N. S.*, 384.

6. The private act between the plaintiff and Weatherly, was recorded and made public nearly a year before the date of the sale to Rils, and has effect as against him from its date. 2 *Louisiana Reports*, 70. 3 *Ibid.*, 425.

7. The article (722) of the Code of Practice under which the district judge decided this case, does not apply. It is admitted that the seizure of an immoveable gives a privilege to the seizing creditor over other creditors; this, however, ceases when his claim is satisfied. But where the property, as in this case, was sold and purchased in by the debtor, he could acquire no greater rights under the sale than he had before, to wit, two thirds, (the other third being sold by him to the plaintiff previously.) The debt of the seizing creditor was satisfied and his rights merged in the twelve months' bond. The defendant, therefore, acquired no right or title to the plaintiff's undivided third part in the disputed premises.

Labauve, for the plaintiff and appellant, argued the case on the same side in court.

Hiriart and *Burk*, for the defendant, filed the following points:

1. The defendant's title is absolute to the whole of the lot in contest, by the sheriff's sale on the 2d of October, 1834, which delivered and transferred the rights acquired by the purchaser under the twelve months' bond on the 6th of August, 1833, and those of the seizing creditor in the proceedings had previously and before the act of sale to plaintiff was made authentic and recorded.

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2. The date of the seizure was previous to the completion of the plaintiff's title by authentic act. This is sufficient, if it had been only one day previous, to disable the debtor from selling and making a complete title, the title under private signature signifying nothing in this case.

Bullard, J., delivered the opinion of the court.

• The plaintiff alleges that he is owner of one undivided third of a certain lot of ground in the village of Plaquemine, of which the other two thirds belong to J. B. Rils, the defendant, and he sues for a partition. The defendant denies the ownership of the plaintiff of any part of the lot in question, and sets up title to the whole as his exclusive property. The only question, therefore, presented by the pleadings, is whether the plaintiff has shown a better title to any part of the lot than the defendant.

The whole lot was formerly the property of J. P. Weatherly, who by act under private signature, purporting to be dated the 22d of December, 1832, sold and conveyed one undivided third to Fenn, the plaintiff. This act was afterwards, on the 6th of August, 1833, duly acknowledged before the parish judge and two witnesses, and recorded in the parish where the property is situated.

In the interval between the date of the private act and the time at which it was recorded, to wit, on the 23d June, 1833, the lot was seized by creditors of Weatherly on execution, and finally sold on the eighth day of August, 1833, and was purchased by Weatherly himself, on a twelve months' bond.

When the twelve months' bond fell due, execution was issued upon it and the same property was again seized and sold by the sheriff, and Rils, the defendant, became the purchaser. In the sheriff's deed to Rils, which bears date 22d of October, 1834, the property is described, and the sheriff conveys it to the defendant, and all the right, title and interest of Weatherly to and in the premises.

Such are the material facts of the case, as shown by the record, and the question this court is called upon to solve is, how much did Rils acquire by the sheriff's sale? That he

acquired all the right and title of Weatherly at the time of the sale, may be safely assumed as undeniable, and then the question presents itself in a new form, to wit, whether the whole lot or only two thirds of it belonged to him at that time. If, in the interval between the first sheriff's sale, when Weatherly became the purchaser, and the second when the property was adjudicated to Rils, Weatherly had by authentic act duly recorded, sold and conveyed one third, it appears to us clear, that only his remaining interest could have passed by a sheriff's sale subsequently made. It is, perhaps, equally clear, that if Rils had purchased at the first sheriff's sale under the seizure made previously to the recording of Weatherly's sale to Fenn of one third, he would have acquired the whole lot, because that sale being under private signature could have no effect against third persons until recorded, and the whole property continued liable to seizure by the creditors of Weatherly. The inquiry, therefore, seems to resolve itself into this: What effect is to be given to the adjudication of the property under the first sheriff's sale to Weatherly himself, as relates to the title of Fenn who had previously acquired one third by purchase from Weatherly? or in other words, what rights did Weatherly acquire by that purchase? We had occasion to examine that question in the case of *Offutt et al. vs. Hendsley et al.*, ante 1, in the Western District, and after much reflection we came to the conclusion, that when the owner of property seized on execution becomes the purchaser at twelve months' credit, he acquires no new title or right. That in truth, as to him it is not legally speaking a sale, but merely a means by which the creditor acquires additional security for his debt. Such a sale cannot be considered as cutting off previous incumbrances as relates to the debtor himself, nor is the character of his previous title or possession changed by such adjudication. We therefore think the intermediate sheriff's conveyance to Weatherly may be laid entirely out of view, considering him as continuing in possession under his previous title, the sale made by him to Fenn, which was always binding on him, took effect as to third persons from

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When the owner of property seized in execution, becomes the purchaser at twelve months' credit on his bond, he acquires no new title or right. As to him it is not legally a sale, but merely a means by which the creditor acquires additional security.

A sale where the debtor buys in his property on a twelve months' bond, does not cut off previous incumbrances as relates to the debtor himself, nor is his previous title or possession changed by the adjudication.

So, where A sold B one third of a lot of ground by private act, which was seized by a creditor of A, before the act was made authentic and recorded, and by him (i. e. A) bought in on his twelve months' bond: Held, that a sale of this property to C, under execution issuing on the twelve months'

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bond of A, was invalid : *Held*, also, that the sale from A to B took effect as to third persons, from the time it was recorded, saving the rights such persons had, in the mean time, acquired in or to the property.

If A sells property of which he is not the owner, and he afterwards acquires title, that title vests at once in his vendee.

the time it was recorded, saving the rights which such persons had in the mean time acquired in or to the property. But, even supposing that Weatherly had acquired a new title by the sheriff's conveyance, that new title as between him and Fenn would have accrued to the benefit of the latter ; for it is considered as settled that if A sells property of which he is not the owner and he afterwards acquires title, that title vests at once in his vendee.

The defendant, Rils, had acquired no right at the time the deed to Fenn was recorded ; he does not appear to have had at that time any interest whatever. He first became interested at the time he purchased at sheriff's sale, and therefore he can avail himself of the want of recording the deed to Fenn, only so far as he represents the creditors at whose suit the property was seized in the first instance. Their claims collectively amounted to less than two hundred dollars. The seizing creditors had a right to make that amount out of the property, notwithstanding the private sale to Fenn.

This court being, for these reasons, of opinion that the plaintiff has shown title to one third of the property in question, subject to one third of the twelve months' bond and one third of the incumbrances of a date previous to August 8th, 1833, so far as they have not been paid by the sale of the other two thirds, and that the defendant acquired by the sheriff's deed only two undivided thirds of the property.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and it is further ordered that the case be remanded with directions to the judge to proceed to a partition according to law, and that the defendant and appellee pay the costs of the appeal.

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LEWIS vs. LEWIS'S HEIRS.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

An attorney in fact of the heirs of a deceased brother, who is empowered to *compound matters* concerning the succession, has authority to compromise with a co-heir for his share, by assuming the payment on the part of the other heirs, of a note held by the co-heir against the succession, after it is barred by prescription.

This is an action on a promissory note, executed by Robert Lewis, the 4th of November, 1822, for the sum of three thousand five hundred and fifty-five dollars, in favor of his brother N. Lewis, the present plaintiff. The maker of the note died in New-Orleans, in 1832. Nicholas Lewis was one of the heirs, and sold his interest in the succession to C. A. Jacobs and W. M. Lambeth, who with the other heirs took possession of the property and effects of the succession. The plaintiff now claims the amount of the note sued on, from the other heirs and the transferors of his brother's estate, in their several virile portions, alleging that when he sold his share in the succession, he expressly reserved the right to enforce the payment of this note.

Lambeth and Jacobs pleaded a general denial, also denying that the plaintiff held the note in good faith, and gave a valuable consideration therefor, putting him on strict proof of all the matters denied and charged in the defence. They also opposed the plea of the prescription of five years.

The heirs of Lewis, deceased, averred their willingness to submit the case on such testimony as may be produced by the plaintiff, in support of his claim, and further aver, that said claim is barred by prescription.

J. Slidell, Esq., witness for plaintiff, stated, that some doubts were entertained of the validity of a bequest made by the deceased, in favor of N. Lewis, the present plaintiff, in

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consequence of which he expressed a willingness to yield all claims under the will, on his brother's estate, provided his other demands on it, arising out of this note, and another held by him were recognised; the note on its face being barred by prescription, such recognition was considered necessary to secure the payment of it to him. Howell Lewis, one of the heirs and acting as attorney in fact for the rest and for himself, assented to this, recognised the note as valid, and as an existing claim against the succession, and promised that it should be paid. The witness identified the note.

Jacobs and Lambeth wrote to the plaintiff, under date of May 12th, 1834, as follows: "The act which you passed in our favor for your share in your late brother's estate, is not intended to preclude any claim you may have against it, by reason of a note of his which you say you are the holder of. At the same time, we make no acknowledgement of the said claim, and reserve to ourselves all legal objections so far as we are concerned."

The powers of attorney under which Howell Lewis acted, on behalf of the other heirs, contained a clause authorising him "to take all lawful means to recover and receive from any person whatsoever in the state of Louisiana, all sums of money, debts, legacies, inheritances, &c. which may be due and owing to us," &c. "and in our names to recover by suit or otherwise, *and to compound and agree for the same, &c.*" These powers were offered in evidence in support of the action. Upon these pleadings, and this testimony on the part of the plaintiff, the cause was submitted to the judge of probates.

The defendants showed that another note of three thousand five hundred and thirteen dollars was given by the deceased to N. Lewis, in 1829, on a settlement which they infer was in lieu of the one sued on.

Judgment was rendered in favor of the plaintiff, for the amount of his claim. The defendants, Lambeth and Jacobs, appealed.

Slidell, for the plaintiff.

1. The proof of failure of consideration lay with the defendant; he could not throw the burden of proof on plaintiff by calling upon him to establish the consideration. **EASTERN DIST. January, 1836,**
8 Martin's Reports, 161. 4 Louisiana Reports, 220.

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2. The abandonment of the pretensions of Nicholas Lewis, in favor of the heirs *ab intestato*, was in itself a sufficient consideration, and was so considered by all the parties interested.

3. Their promise and acknowledgement established by the testimony referred to, disposes of the defendant's plea of prescription; it was made before the sale to Lambeth and Jacobs, and binds them for their proportion. The other heirs have not appealed.

L. C. and G. Duncan, for the appellants.

1. The testimony of the defendants, identifies the note executed in 1829, and which has been paid by the executor of R. Lewis, with the one sued on. Besides, in their answer, the defendants required the plaintiff to prove the consideration of this note, and his failure to administer this proof entitles the defendant to judgment. *Bailey on Bills, 318 and 350. Chitty do. 445.*

2. The testimony of Mr. Slidell does not sufficiently establish the assumpsit by all the heirs who sold to Lambeth and Jacobs, of the note in question. Its identity and validity is not sufficiently established by the testimony of a single witness, without other corroborating circumstances. *Louisiana Code, 2257, 2965.*

3. The plea of prescription is clearly with the defendants. The note is dated in 1822, and the final settlement between the plaintiff and his deceased brother, is shown by the testimony to have taken place in May, 1829, and this suit was not commenced until November, 1834.

Mathews, J., delivered the opinion of the court.

This suit is based on a note of hand, given by the ancestor of the defendants, to the plaintiff. This note was barred by prescription at the time when a compromise or transaction

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took place between N. Lewis, who was legatee in the will of his brother, Robert, for a large amount, and the rest of the heirs of the said Robert, in which he agreed to abandon his claim as legatee, on condition that he should receive payment of the note now sued on amongst other claims which he had against his brother's succession. He obtained judgment in the court below, from which the defendants appealed.

That the heirs had a right to assume the payment of this note (being at the time of the assumpsit barred by prescription) there can be no doubt ; and according to the evidence, there is as little doubt, that through the agency of their relation, Howell Lewis, they did assume to pay it.

An attorney in fact of the heirs of a deceased brother, who is empowered to compound matters concerning the succession, has authority to compromise with a co-heir for his share, by assuming the payment on the part of the other heirs, of a note held by the co-heir against the succession, after it is barred by prescription.

The only question is, whether their attorney in fact had authority to act for them in relation to the compromise, as he assumed to do, touching this note. He was authorised by the power of attorney to compound matters concerning the succession of his brother, and under this impression we are of opinion that he had a right to transact for his constituents and make the assumpsit which he did, especially when we take into view that the rights and claims of the plaintiff, as legatee of his brother Robert, were doubtful.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

DIXON vs. EMERSON.

**APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE OF
 THE SECOND PRESIDING.**

The action to annul a mortgage made by a debtor, on the ground of fraud as relates to creditors, must be commenced within one year from the date of the judgment which the creditor seeking it, has obtained against the debtor.

Evidence will not be received to show that a previous mortgage on certain property has been paid off, when there is no allegation in the petition of payment; nor to establish fraud against other creditors in executing the mortgage by the debtor, when the action to annul it is prescribed by the lapse of one year.

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In an action to annul a conventional mortgage, as made in fraud of creditors, when the pleadings admit the existence of the act importing the mortgage, it is not necessary to offer it in evidence. The only question for the jury in such a case is, whether the mortgage should be rescinded, or annulled as fraudulent.

This case commenced by an injunction to stay an order of seizure and sale obtained by the defendant against the property of W. Aborn, in the parish of Iberville, on which the plaintiff in injunction claims to have a higher mortgage.

The plaintiff obtained judgment against Aborn for one thousand five hundred and forty-seven dollars, which was recorded in the parish judge's office the 15th of October, 1834.

In January, 1835, Thomas Emerson, by his agent, H. Emerson, obtained an order of seizure and sale against the property of Aborn, under a mortgage executed by the latter to T. Emerson, in 1832, for endorsements he had paid and goods sold to a large amount.

The plaintiff alleges this mortgage is fraudulent and collusive, and made at a time when the said Aborn was in insolvent circumstances, and incapable of making or mortgaging his property to one creditor in preference to others. She prays for an injunction to stay the order of seizure, and that a curator *ad hoc* be appointed to defend the absentee in this case; and further, that she be decreed to be paid out of the proceeds of the property seized, in preference to said Emerson, in virtue of her judicial mortgage, &c.

Burk, appointed curator *ad hoc* to Emerson, excepted and moved to dismiss the suit on the ground that the action was prescribed by the lapse of one year, &c.; and that the plaintiff could not collaterally inquire into the validity of Emerson's mortgage, &c. He also answered, pleaded a general denial, and specially denied all the plaintiff's allegations and rights set up in her petition.

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Upon these pleadings the parties went to trial. In the course of the trial several bills of exceptions were taken to the decision of the judge presiding, and which are fully stated in the opinion of the court. The cause was submitted to a jury, who returned a verdict for the defendant. From judgment rendered thereon, the plaintiff appealed.

Labauve and Stacy, for the plaintiff and appellant.

Burk, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff having a judicial mortgage on the property of one Aborn, procured from the court of the first instance an order on the sheriff, to hold in his hands the proceeds of a sale about to be made by him in pursuance of an order of seizure and sale against the same property, at the suit of Emerson, under a conventional mortgage of prior date. She claims to be paid out of the proceeds, in preference to the seizing creditor, on the allegations, 1st, That Aborn, the owner of the property, was in failing circumstances, at the time he gave the mortgage to the seizing creditor; and 2d, That the mortgage was fraudulent, collusive and without consideration, and intended only to screen the property from the pursuits of his just creditors.

A curator *ad hoc* appointed by the court to represent the absentee, Emerson, put in an answer denying the fraud and collusion, and alleging that the mortgage was fairly given for valid considerations. He further pleaded prescription, and that proper parties had not been made, and denying the plaintiff's right to inquire collaterally into the validity of the mortgage. The verdict and judgment were in favor of the defendant and the plaintiff appealed.

So far as the plaintiff seeks to annul the mortgage to the defendant on the ground of fraud, we are of opinion that the plea of prescription is sustained by the evidence on the record; more than one year had elapsed after the rendition of the judgment in favor of the plaintiff before this proceeding

The action to annul a mortgage made by a debtor, on the ground of fraud as relates to creditors, must be commenced within one year from the date of the judgment, which the creditor seeking it has obtained against the debtor.

was instituted, during which time the mortgage existed and appears to have been duly recorded. *La. Code, article 1989.*

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It only remains to inquire whether the plaintiff has shown any privilege to be paid out of the proceeds in preference to the seizing creditor, according to article 401 of the Code of Practice. We think she has not. She has a judicial mortgage of a date subsequent to the conventional one under which the property was seized, and the conventional mortgage must first be satisfied.

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On the trial below, the plaintiff offered a witness to prove the admissions of Warren Aborn, the common debtor, that the claim of Emerson had been long previously extinguished and paid for more than one half, and also the declaration of Aborn that the mortgage in favor of Emerson was entirely under his control. The evidence was rejected and a bill of exceptions taken. We are of opinion the court did not err in rejecting the evidence offered. The petition contains no allegation of payment, and so far as the admissions of Aborn would go to establish fraud, even if admissible, they could not in this case avail the plaintiff, because her action was prescribed.

Evidence will not be received to show that a previous mortgage on certain property has been paid off, when there is no allegation in the petition of payment; nor to establish fraud against other creditors, in executing the mortgage by the debtor, when the action to annul it is prescribed by the lapse of one year.

There is a further bill of exceptions to the charge of the judge to the jury. It appears that during the trial neither party offered in evidence any act or copy of mortgages from Aborn to Emerson, nor any power of attorney from Emerson to any person, but both parties expressly declared that they did not offer such acts in evidence; whereupon the court instructed the jury, that the plaintiff by intervening in the suit of Emerson *vs.* Aborn, and opposing the claims of Emerson, had admitted the existence, formality and genuineness of the acts of mortgage, declared upon by Emerson against Aborn, and that it was not incumbent on Emerson to produce in evidence, and prove the genuineness, dates and legal effect of said acts, against the claims of the plaintiff, but that the plaintiff was permitted to show only either the insolvency of Aborn at the time the mortgage was given, or that it was in fraud of the rights of other creditors.

In an action to annul a conventional mortgage, as made in fraud of creditors, when the plead-

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ings admit the existence of the act importing the mortgage, it is not necessary to offer it in evidence. The only question for the jury in such a case is, whether the mortgage should be rescinded, or annulled as fraudulent.

The court, in this view of the case, did not, in our opinion, err. The pleadings admit the existence of an act purporting to be a special conventional mortgage, in favor of Emerson, on which an order of seizure and sale had already issued by the same court. The only question submitted to the jury, was the validity of that act in relation to the plaintiff. It was surely not the duty of the defendant to give in evidence an act whose existence forms the basis of all the proceedings in the case, and the court very correctly told the jury that the only inquiry was, whether that act of mortgage ought to be rescinded as fraudulent.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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MORTIMER vs. TRAPPAN'S ESTATE.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Compensation or payment must be pleaded, to authorise the defendant to offer evidence showing the plaintiff had received various sums of money, to a greater amount than he claims in his demand.

Under the plea of the general issue, evidence of payment will not be received.

The plea of payment is a peremptory exception, going to extinguish the action, and which the Code of Practice requires to be pleaded.

This is an action on an account, stated by the plaintiff, against the estate of the late J. J. Trappan, in which he

NOTE.—In the case of *Fram vs. Allen*, 3 *Martin*, 381, the plaintiff claimed a balance of account. Defendant pleaded the general issue, and offered evidence to show that the plaintiff omitted in the account, sundry credits in favor of the former, which evidence the court *a qua* rejected. *Held*, that it was admissible, because, instead of demanding the price of the goods furnished, the plaintiff opposes the defendant's claim to his, to compare and establish a balance between the two; in such a case both accounts are put at issue, and any evidence tending to support or contradict the correctness of either, ought to be admitted.

claims a balance of five hundred and two dollars, as due to him, after allowing credit for cash paid him at various times. He alleges the executor refused to allow his account, wherefore, he prays judgment, &c.

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The executor pleaded the general issue. The plaintiff made proof of his demand.

In the course of the trial, the defendant offered written evidence to show that the plaintiff had received at various times, sums of money to a greater amount than he has given credit for in his account annexed to his petition. The court refused the evidence, on the ground that it was inconsistent with the plea of the general issue; that payment or compensation are pleas inconsistent with the plea of the general issue, and that as the defendant did not avail himself of the right of withdrawing the plea of the general issue and to plead specially, either compensation or payment, the proof of either was inadmissible. A bill of exceptions was taken by the defendant's counsel to the opinion of the court.

The court, after hearing the evidence and scrutinizing the account, rendered judgment in favor of the plaintiff for three hundred and ninety-five dollars and fifty cents. The defendant appealed.

L. Janin, for the plaintiff.

1. An examination of the bill of exceptions will show that this claim is unfounded. It states that the defendant wanted to prove that the plaintiff had received more than he had allowed in his account. The court refused to admit the testimony, "because the defendant had pleaded the general issue, and ought to have pleaded compensation and payment, and *refused to plead them now*, and withdraw the general denial."

2. The defendant, therefore, attempted to prove payment or compensation. These are peremptory exceptions, which the Code of Practice requires to be pleaded specially. *Code of Practice*, 345-6. 6 *Louisiana Reports*, 457.

3. The case of *Fram vs. Allen*, 3 *Martin's Reports*, 381, cited by the appellant, was decided before the Code of

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Practice, when the privilege granted by article 346 of that code, of pleading peremptory exception at any stage of the action, did not exist. Under this code there exists, therefore, no longer any reason for permitting the defendant to prove payment, without pleading it expressly. He might plead it at the trial, and if he refuses to do so, it is difficult to find any reason for it, except a wish to surprise his adversary. It appears from the bill of exceptions, that it was suggested to the defendant to plead payment or compensation at the moment of the trial, that this plea would have been admitted, and that he refused to make it.

4. The plaintiff had certainly a right to be made acquainted with the payments it was intended to prove, in order to procure evidence, either that they had not at all, or that they had been made to him on a different account, and to demand time, if necessary, to obtain this evidence. The latter privilege would be granted by the Supreme Court, article 902, and could not be justly refused by the inferior court.

Buchanan, for the defendant, contended, the judge *a quo*, erred in rejecting his evidence, as shown by the bill of exceptions, in deciding that it could only be received under a special plea of payment or compensation. This court has decided differently. See case of *Fram vs. Allen*, 3 *Martin*, 381.

2. In that case, as in this, the plaintiff submitted to the consideration of the court, not his claim against the defendant alone, but the credits or offsets to which the defendant was entitled. In the very words of the court, he established a balance, and it was competent to the defendant under the general issue, to show that such balance was erroneous.

3. The decision in the case of *Gleises vs. Faurie*, is opposed to me, but an inspection of that case will show its difference from the present one. There a demand was made for rent, without any credits given. The answer was the general issue, and a small offset. On the trial, plaintiff attempted to show that the sum claimed had been paid, an attempt manifestly at variance with the pleadings. But here, a clerk sues for wages, and credits with so much received at sundry

times : the defendant denies the correctness of the account, and on trial, attempts to show that the credit given is too small ; that plaintiff has received more cash than is allowed in his account. This testimony was properly admissible, because the general denial, was a denial of the credit as well as the debit side of the account.

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4. The authority of the case of *Fram vs. Allen*, is impugned on the ground of its having been made before the Code of Practice. This work has, however, made no change in the point of pleading in question. The court say, in that opinion, that payment or compensation must be pleaded specially, but go on to inquire, whether this is a case where compensation need be pleaded at all, and decide in the negative.

5. The liberty was offered me, says my adversary, to plead compensation on the trial. This was not a *favor*, but a right. *Code of Practice*, 367. But I could not consent to avail myself of it, for compensation would have admitted the principal demand. Plaintiff claims wages at the rate of sixty dollars per month. The defendant's witness, Ralph Jacobs, proves positively that plaintiff was to have but forty dollars per month.

Bullard, J., delivered the opinion of the court.

The plaintiff sues for the amount of a promissory note and a balance due him for wages, as clerk, by the defendant's testator, as shown by the note and account annexed to the petition. The defendant having answered by a general denial, offered in the progress of the trial to show by written evidence, that the plaintiff had received various sums of money to a greater amount than was admitted in his account. The evidence was rejected on the ground that payment or compensation ought to have been pleaded. A bill of exceptions was taken, from which it further appears that the defendant declined an offer to permit him to amend his answer, and add a plea of payment or compensation. We think the court did not err. In the case of *Gleises vs. Faurie et al.*, we held that payment must be pleaded. 6 *Louisiana Reports*, 455. The plaintiff who had admitted credits in his

Compensation or payment must be pleaded, to authorise the defendant to offer evidence showing the plaintiff had received various sums of money, to a greater amount than he claims in his demand.

Under the plea of the general issue, evidence of payment will not be received.

EASTERN DIST. account to the amount of four hundred and twelve dollars and
January, 1836. eighty cents, without specifying particular sums or times of

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The plea of surprise. The case of *Fram vs. Allen*, relied on by the
 payment is a appellant, was somewhat different from this, and decided
 peremptory ex- before the promulgation of the Code of Practice. 3 *Martin*, 381.
 ception, going
 to extinguish
 the action, and
 which the Code
 of Practice re-
 quires to be
 pleaded.

such payments, might not have it in his power to show
 instanter that the payments offered to be shown were, in
 fact, already credited: parties are to be protected against

surprise. The case of *Fram vs. Allen*, relied on by the
 appellant, was somewhat different from this, and decided
 before the promulgation of the Code of Practice. 3 *Martin*, 381.

It is, therefore, ordered, adjudged and decreed, that the
 judgment of the Court of Probates be affirmed, with costs.

VOISIN, AGENT, &C. vs. JEWELL.

**APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
 THEREOF PRESIDING.**

In an action on a promissory note, payable at a particular place, it is alleged
 in the petition that the note was duly protested for non-payment, and
 the protest offered in evidence, shows that payment was demanded at the
 proper place, a recovery will be had without an *allegation* that payment
 was demanded *at the place* where the note was made payable.

Objections to evidence should all be made at once, so as to give the opponent
 a fair opportunity to remove them or correct his mistakes.

This is an action by Voisin as agent of Didier Dreux, the
 endorsee and holder of a promissory note for two thousand
 five hundred and fifty dollars, executed by the defendant,
 widow Jewell, and payable at the end of March, 1834, *at the*
domicil of Dubertrand & Legendre, in New-Orleans. The
 petition alleges, that when the note became due it was duly
 protested for non-payment, of which the maker was duly
 notified.

The defendant admitted her signature, and averred she
 had settled and paid the amount of the note in question to

Dubertrand & Legendre, the original payees, who were to have given it up; that it was transferred by endorsement after it became due, of which payment and settlement the plaintiff had notice; and further, that he did not come fairly into the possession of the note.

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She prays that Dubertrand & Legendre be cited in warranty to defend, and that in case judgment is rendered against her, she may have the same judgment over against her warrantors, &c. Interrogatories as to the transfer of the note with a knowledge that it was paid were propounded to the plaintiff.

On the trial the plaintiff produced in evidence the protest of the note, in which it appeared it had been regularly transferred by endorsement to the plaintiff, before maturity, and that payment was demanded *at the domicil* of Dubertrand & Legendre in New-Orleans, when the note became due, and where it was made payable, and it was protested for non-payment.

The answers of the plaintiff to defendant's interrogatories were also in evidence under objections raised by the defendant's counsel, which are not material in a statement of the case.

The plaintiff had judgment for the amount of the note sued on. The defendant appealed.

Cooley and Hoa, for the plaintiff.

A. N. Ogden, contra.

Mathews, J., delivered the opinion of the court.

This is a suit by the endorsee of a negotiable note against the maker, a resident of the parish of Pointe Coupée. It was made payable at a particular place in New-Orleans, but was not paid at maturity. After various delays, judgment was rendered in favor of the plaintiff by the court below, from which the defendant appealed.

We find in the answer several exceptions, pleaded by the defendant to the imperfect manner in which the plaintiff's

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In an action on a promissory note, payable at a particular place, an allegation in the petition, that the note was duly protested for non-payment, and the protest offered in evidence shows that payment was demanded at the proper place, a recovery will be had, without an allegation that payment was demanded at the place where the note was made payable.

Objections to evidence should all be made at once, so as to give the opponent a fair opportunity to remove them, or correct his mistakes.

case is set forth in the petition. These were overruled, and she was finally compelled to answer on the merits. One of the objections to the petition is, that it contains no direct allegation that payment of the note was demanded at the place where it was made payable. In this respect the petition is somewhat informal, but as it contains an allegation that the note was duly protested for non-payment, and the protest offered in evidence shows that payment was demanded at the proper place; this exception ought not to be allowed to prejudice the plaintiff's claim.

On the trial of the cause, objections were made to the introduction of certain answers of the real plaintiff (who resides in France) to interrogatories propounded by the defendant. These were overruled by the court as being made too late, this evidence having been previously opposed on other grounds than those urged in the last instance. It would certainly have a great tendency to delay and obstruct the administration of justice, if parties should be permitted to divide their objections to evidence into infinitesimal parts and use them successively at different times. All ought to be made at once, so as to give the opponent a fair opportunity to remove them or correct his mistakes. The record exhibits much confusion in the manner in which this suit was conducted in the court below, and great ingenuity in the defence, aided by powerful affidavits of the defendant. But we believe that the judge did not finally err in the opinions expressed on interlocutory matters.

The judgment of the court below as rendered on the testimony received, is clearly correct.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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MAHER ET AL. vs. OVERTON.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

In an action by the acceptors of a bill against the drawer, who directed it to be charged to account of the steamer *Walter Scott*: *Held*, that the agency of the drawer is apparent on the face of the bill, by directing it to be charged to account of the steam-boat, which negatives the idea that he was to be personally bound.

This is an action by the acceptors against the drawer of the following bill :

“\$600. New-Orleans, August 18th, 1834.

“Four months after date, please pay to Messrs. J. C. Garthwaite & Co., or order, the sum of six hundred dollars, value received, *and charge the same to account of steamer Walter Scott.*

“Oblige yours,

“J. P. Overton.”

“To Messrs. M. & P. Maher, Merchants, New-Orleans.”

(Written on the face) “Accepted, M. & P. Maher.”

(Endorsed on the back) “J. C. Garthwaite & Co.”

“Office of the Bank of the United States.

“Received payment on the 24th December, 1834.

P. Martin, Note Clerk.”

The plaintiffs allege that when this bill was accepted and paid by them, they had no funds of the drawer or of the steamer *Walter Scott* in their hands. They further allege, that the defendant is part owner of the steamer *Walter Scott*, and they pray that his interest therein be attached, and that they have judgment for the amount of their claim and interest.

The attorney appointed to defend the absent defendant in this case, pleaded a general denial.

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Upon these pleadings, the parties went to trial before the court. The judge who tried the case, was of opinion the plaintiffs had shown no cause of action against the defendant. Judgment was, therefore, rendered in his favor, from which the plaintiffs took an appeal.

Reynolds, for the plaintiffs.

1. The defendant is liable, personally, because the draft or bill sued on, is signed by him in his individual capacity, and not as agent of the steamer Walter Scott, or of any other person. A power to draw as agent, must be express and so stated. Where an agent contracts in his own name, he adds his personal responsibility to that of his principal, even if he is empowered to act or draw bills. *Collier on Partnership*, 652. 4 *Louisiana Reports*, 64. *Louisiana Code*, 2966. *Chitty on Bills*, (small edition) 35-6.

2. The direction on the face of the draft to the acceptors, to charge the same to account of steamer Walter Scott, is not sufficient to shift the responsibility from the defendant, and require the plaintiffs to look to the steam-boat. Nor can it induce the court to raise the legal presumption that he acted as agent of the boat, so as to render its owners liable. The provision of the Code is express on this subject. *Louisiana Code*, 2966.

The obligation sued on, is in the nature of a bill of exchange; is signed by the drawer in his own name and capacity, alone. He thereby became personally and absolutely bound. The commercial law requires an agent drawing bills, to write the name of his principal, or state expressly in writing, that he draws as agent, &c., and is not to be liable personally; and if a person draws in his own name, without stating that he acts as agent, he will be personally liable, unless in case of an agent contracting for government. *Chitty on Bills*, edition 1826, page 27, and note 36, there cited. 11 *Mass. Reports*, 54.

P. F. Smith, for the defendant.

1. It is evident on the face of the draft, that the defendant drew it as agent of the steam-boat; he can only be made liable by showing he was without or exceeded his authority in drawing it. *Louisiana Code, 2982.*

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2. The plaintiffs alone knew when the draft was presented, whether they had funds of the steamer Walter Scott in their hands or not. Their acceptance and payment of it raises the legal presumption that they had funds, which throws the burden of proof on them that they had no funds of the steam-boat.

3. The defendant cannot be made liable now as drawer on a bill which has been paid, or which has been specially for his honor. He can only be liable as for money advanced for his use, and the plaintiffs must show that it was.

4. There is no proof of want of funds of Overton in the hands of the plaintiffs. It is a legal presumption that the drawer has funds in the hands of the drawee and acceptor. The principles involved in this case are precisely the same as those decided in the case of *Clegg et al. vs. Alexander*, 6 *Louisiana Reports*, 336.

Sterrett, for plaintiffs, argued in reply.

Martin, J., delivered the opinion of the court.

This is an action by the acceptors against the drawer of a bill of exchange for the sum of six hundred dollars.

The plaintiffs having accepted the bill, and paid it at maturity to the holders, without any funds of the drawer being in their hands, instituted suit against the latter to recover the money advanced on his bill. The defendant resisted the demand on the ground that he drew as agent of the owners of the steamer Walter Scott, and was not, therefore, personally bound. Judgment was rendered in his favor, from which the plaintiffs appealed.

Many authorities have been cited and read to the court to show, that as the defendant did not annex the word *agent* to his name in signing the bill, that he thereby added his personal responsibility to that of his employers.

In an action by the acceptors of a bill against the drawer, who directed it to be charged to account of the steamer W. Scott: *Held*, that the agency of the

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drawer is apparent on the face of the bill, by directing it to be charged to account of the steam-boat, which negatives the idea, that he was to be personally bound.

It does not appear to this court, that the judge who tried the case in the first instance, erred in the judgment he rendered. We are of opinion, that the agency of the drawer is apparent on the face of the bill. This clearly results from the tenor of it, in which the plaintiffs are directed to *charge* the *same* to the account of the steamer Walter Scott, and which excludes or negatives the idea of a personal charge to the drawer.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

M'MILLAN vs. GIBSON ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

When all the documents mentioned in the certificate of the clerk to the record, are not produced in the Supreme Court, the appeal will be dismissed.

This case comes up on a motion to dismiss the appeal, for want of several documents to complete the record.

The clerk certifies at the foot of the record, that it "contains all the testimony (except the documents which will be produced in the originals before the Supreme Court) adduced in the cause, and a full and complete transcript of the record of the case, wherein, &c."

When the cause came on for trial, the documents mentioned in the certificate to be produced in the originals, were not filed.

Roselius, for the plaintiff and appellee, moved to dismiss the appeal, because the record was not complete, and the matter involved in the controversy, is now *res judicata*.

Sterrett, for the appellant, *contra*.

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Martin, J., delivered the opinion of the court.

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In this case, the record and evidence of the proceedings and trial in the inferior court, is so imperfect and defective, as to preclude an examination on the merits.

The clerk's certificate attests, that the record contains all the evidence on which the case was tried, except some documents, the originals of which were to be produced in the Supreme Court. The appellant has not brought up, or produced any in this court, consequently we are unable to act on the case.

When all the documents mentioned in the certificate of the clerk to the record, are not produced in the Supreme Court, the appeal will be dismissed.

The appeal must, therefore, be dismissed, at the costs of the appellant.

BAUMGARD vs. MAYOR ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where property is seized for a violation of a city ordinance, although the seizure is lawful in its commencement, yet if the city authorities fail to pursue the requisites of the law, in advertising and disposing of it, the acts of the officer making the seizure will be considered as a trespass, *ab initio*, for which his constituents are responsible.

In this case the plaintiff claims an omnibus and pair of horses, which he alleges have been illegally and forcibly taken from his possession, by the agent of the corporation of New-Orleans, and by them illegally detained. He claims one thousand dollars in damages, for the property seized and the loss sustained thereby, or the return of the carriage and

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horses, and one hundred dollars in damages for their illegal seizure and detention.

The corporation, by its attorney, pleaded a general denial, and averred, that if the carriage and horses had been arrested as alleged, it was for lawful cause, and not illegal, as alleged by the plaintiff.

Upon this issue the parties went to trial.

The evidence showed, that the plaintiff's omnibus and horses were arrested by the commissioner appointed by the corporation to inspect carriages, drays, &c., as running in contravention of a city ordinance, approved December 1st, 1828, the first and second articles of which require every person running a coach, &c., within the limits of the city, to take out a license; the third article prescribes a penalty of ten dollars for each contravention of the first article, by running without a license; the fourth article says: "The mayor shall cause to be stopped and carried before a competent tribunal every carriage found running without a license, or without numbers; the magistrates are to detain said carriages and horses drawing the same, and send them to a place of deposit, designated by the mayor, there to remain fifteen days subject to the claim of their proprietors, causing in the mean time full notice to be given thereof in the newspapers. If not reclaimed at the end of fifteen days, the magistrates are duly authorised to cause the objects seized to be sold conformably to law, and the proceeds applied to the payment of all fines, penalties and costs incurred; the surplus, if any, to be returned to the owners," &c.

The 6th article of this ordinance requires "all carriages designated in the first article, to be numbered with figures on a tin plate," &c. See *City Laws*, page 71.

It appeared the plaintiff had failed to take out a license and number his carriage as required.

The driver of the carriage deposed that it was seized, together with the horses, on the 2d of February, 1835, while standing in Canal-street, by a commissioner of the city police and carried to the City Hall. He estimates the carriage to be worth six hundred dollars and the horses one hundred dollars.

Lalande, the commissioner, deposed that he arrested the carriage and horses for want of a license, and number on the carriage, as required by the city ordinance. The horses were tendered to the driver after taking the carriage to the mayor's office, but he refused to receive them. The carriage was then sent to a place of deposit, and the horses to a livery stable.

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The seizure took place on the 2d of February, and on the 5th the plaintiff commenced this suit by filing his petition. There were no steps taken to advertise and sell the property seized. No proof of any demand having been made on any of the agents of the corporation for the carriage and horses before suit was instituted. An agent of the plaintiff afterwards demanded the horses from the livery stable keeper, but was informed he must pay the expenses first.

The parish judge considered the seizure as having been lawfully made in the first instance, and no proof being made of any demand and offer to pay the penalty and costs incurred, judgment was rendered in favor of the defendants. The plaintiff appealed.

McMillen, for the plaintiff.

We contend that there is error in the judgment of the Parish Court, because the ordinances of the City Council do not authorize the corporation to take possession of plaintiff's property except by the intervention of justice. See *Digest of City Ordinances*, page 71.

2. If the city ordinances contemplated such proceedings, they are illegal and unconstitutional. No person can be deprived of his property, except by due course of law. *Amendments to Constitution of the United States*, section 25.

3. The corporation can in no instance, for a violation of its ordinances inflict a fine or penalty beyond one hundred dollars; here they have taken property, inflicted fines, and caused damages to the amount of several thousand dollars.

4. The person arresting the horses and carriage, was neither a commissary, a member of the city guard or police officer.

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Eustis, for the corporation, contended, that the plaintiff's carriage was in flagrant violation of the city ordinances, being without a license and without a number. *City Ordinance of 1828, articles 1 and 6. Digest of Ordinances, pages 71 and 73.*

2. That therefore the arrest of the carriage and horses was lawful under the ordinances. *Ibid., article 4.*

3. That the defendants *were not bound* to institute any legal proceedings in relation to the violation of the ordinance by plaintiff. They could waive it or remit the fine. *Digest of City Ordinances, page 301.*

4. That the carriage and horses were taken to the proper place. "That the police officers and city guards be authorised to arrest and keep in their custody all carts, drays and other carriages not *bearing an apparent number*, as required by the ordinance relative thereto, and that, said carts, drays or other carriages shall be brought *before the principal and there detained until their owners shall claim them.*" *Digest of Ordinances, page 301. See also, Ordinances cited, art. 4, page 73.*

5. The owner never having claimed them before the suit, there was no fault on the part of the defendants—their officer having taken the carriage *before the principal*, as is proved by the testimony of his own witnesses, and if the plaintiff chose to leave it there, it is his own act *Volenti non fit injuria.*

6. Every act proved to have been done by the agents of the defendants is in conformity with the ordinances of the city, the legality of which is indisputable under the law of the legislature of March 10th, 1834, section 3. See *Laws of 1834, page 137.*

Mathews, J., delivered the opinion of the court.

This is an action in which the plaintiff seeks to recover from the corporation, a carriage called an omnibus, and a pair of horses, or their value, in consequence, as he alleges, of an illegal seizure and detention of this property, by an officer acting for the body politic.

The answer to the complaint, contains a general denial and justification. Judgment was rendered for the defendants in the court below, and the plaintiff appealed.

The seizure was made under an ordinance of the city, relating to all kinds of carriages used to carry passengers or freight for hire, and was perhaps lawful in its commencement; but the steps taken in pursuance of the seizure, are alleged to have been illegal and without authority, the effect of which has been arbitrarily to deprive the plaintiff of his property, without any legal or just cause.

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The ordinance relied on, in justification of the proceeding adopted by the corporation, was passed on the 30th October, 1824, and the property seized comes clearly within the purview of the first article. The fourth article directs explicitly the disposition which must be made of property seized and stopped under its authority. It is made the duty of the officer seizing, to carry the things seized before a competent tribunal, to be sent to a place of deposit designated by the mayor; notice is required to be given of these proceedings, and if no claim be put in on the part of the proprietor within fifteen days, the magistrate is authorised to cause the objects thus arrested to be sold, and appropriate the proceeds to the payment of any fine which may be imposed, free of license and taxes, and if there be any surplus it is to be placed in the treasury of the city, subject to the order of the proprietor. It does not appear that any of these measures were pursued in the present instance, and as the provisions of the ordinance are restrictive of the free use of property by owners, to justify such a short handed mode of redressing the violation of the law, all the means calculated to relieve a proprietor ought to be shown to have been fully complied with. It is urged in argument as an excuse for not having acted strictly in conformity with the requisites of the ordinance, that the plaintiff was so prompt in endeavoring to recover his property by immediately commencing suit, that the defendants had not time to pursue the regular course pointed out to them. We are unable to assent to the force of this argument, because the law made it the duty of the officer who seized to carry the property directly before a competent tribunal; and besides it would have been very easy for the defendants in answer to the plaintiff's action to have insisted on proper

property is seized for a violation of a ordinance, although the seizure is lawful in its commencement, yet if the city authorities fail to pursue the requisites of the law in advertising and disposing of it, the acts of the officer making the seizure will be considered as a trespass *ab initio*, for which his constituents are responsible.

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redress for the violation of the ordinance, as a condition on which the property would be restored to the owner. Having failed in the performance of all these things, the act of their officer may well be considered as a trespass *ab initio*, for which his constituents are responsible.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be avoided, reversed and annulled. And it is further ordered, adjudged and decreed, that the defendants and appellees do deliver to the plaintiff and appellant the carriage and horses which were seized and arrested by their officer; or in default thereof that they pay to him the sum of eight hundred dollars; and it is moreover ordered, that this cause be remanded to the court below to cause the damage which the plaintiff has suffered, (if any he has suffered by the misconduct of the defendants) to be assessed, they to pay the costs in both courts which have already accrued.

BLOODGOOD ET AL. vs. HAWTHORN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The plea of the general issue, which puts at issue all the facts, on the proof of which rests the plaintiffs right to recover, is not waived by a subsequent plea, which sets up the defendant's agency, as a defence against the action. The two pleas are not inconsistent.

A person having a right to draw a bill of exchange, in consequence of engagements between him and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and not as coming within the exception, that the drawer without funds in the hands of the drawee, is not entitled to notice of non-acceptance and dishonor of his bill.

The drawer of a bill when sued by the holder, is entitled to notice of its non-acceptance and dishonor; or by averments in the pleadings and

notice at the trial, of the intention of his adversary to hold him liable, on the ground that he drew without authority, and without funds in the hands of the drawee, notwithstanding the want of notice.

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This is an action on a bill of exchange. The plaintiffs are the endorsers and holders of a bill for two thousand dollars, drawn by the defendant in Mobile, on one George Chancee, in New-York, in favor of J. Stocking, jr., and by him endorsed in blank, payable seven months after date of the 16th October, 1829.

The plaintiffs allege, that demand both for acceptance and payment, was duly made on the drawee, who refused to accept and pay the same, of which due notice was given to the defendant; that he is liable to pay the amount of the bill, with damages, interest and costs, for which they pray judgment.

In a supplemental petition, the plaintiffs allege the loss of the protest accompanying the bill, and that the notary has removed, so as to put it out of their power to procure evidence of the protest. They propound an interrogatory to the defendant, to say if he had not received the letter of the notary, advising of the protest for non-acceptance of his bill.

The defendant pleaded a general denial, and averred that he drew the bill sued on, as agent of a salt company, which fact of his agency, he avers, was notorious, and well known to the plaintiffs before they took the bill.

Upon these pleadings, the district judge was of opinion, the evidence adduced, established the plaintiffs' claim to the amount demanded in the petition. Judgment was rendered accordingly. The defendant appealed.

Peirce, for the plaintiff.

Gray, for the appellant, contended,

1. Notice of non-acceptance must be given to the drawer of a bill, or he is discharged from all liability. *Chitty on Bills, and cases there cited.*

2. Notice was alleged, and must be proved if denied, or else the plaintiff's case is not made out. In this case there is

EASTERN DIST. no proof of notice. 9 *Martin*, 468. 4 *Ibid.*, N. S., 516.
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3. There is no law requiring a special plea of want of notice before plaintiff can be called upon to prove it. It is averred in the petition as among the conditions which executed give the right of action, and it must be proved unless admitted in the answer.

4. The plea of the general denial puts all matters at issue averred in the petition, unless in those cases where the matter, if pleaded, would constitute a dilatory exception. *Curia Philip. Citaccà*, Nos. 2 and 3. 2 *Martin*, N. S., 389. 5 *Louisiana Reports*, 405, or in others where positive legislation has interfered and required it as in the cases of promissory notes where the signature is to be proved. 8 *Martin*, N. S., 300. 1 *Louisiana Reports*, 488, &c.

5. All the above are instances (together with those in cases of an amicable demand) which come under the denomination of exceptions, either dilatory, declinatory or peremptory. When an answer is made to the merits, it is sufficient to deny generally. *Code of Practice*, 323, 331, 27. The answer of the want of notice would not make an exception dilatory, declinatory or peremptory; it will be tried upon the merits, and therefore cannot require a special plea, according to our system of pleading.

6. The fact of a special plea being made in the answer, does not affect the denial made by the general issue. 3 *Martin*, N. S., 223.

7. The Supreme Court will not regard the judgment of the court *a quo*, as to the facts, where the evidence is wholly documentary. 8 *Martin*, N. S., 689.

Bullard, J., delivered the opinion of the court.

This is an action by the endorsee of a bill of exchange against the drawer. The plaintiffs allege that the bill was presented both for acceptance and payment, and on non-acceptance, was duly protested, and due notice of its dishonor given to the defendant.

The defendant, in his answer, denied all the allegations in the petition, except such as were specially admitted, and he goes on to admit that he drew the bill, but avers that he drew it as agent of the Alabama Salt Manufacturing Company, and that his agency was notorious both in New-York and Mobile, and was well known both to the payee and to the present holders, then resident at Mobile where the bill was drawn.

The defence on the ground of agency has been abandoned in the argument, the defendant having failed to show that the plaintiffs took the bill with a knowledge that it was drawn by him in that capacity, although it appears to have been known by the original payee, and he relies on the general denial and the absence of all proof of notice to him of the non-acceptance or non-payment as alleged in the petition.

It is sufficiently shown that the bill was presented and duly protested, but there is no evidence that notice was given to the drawer. Without such evidence the plaintiffs are not entitled to recover, unless they bring their case within the exceptions to a general rule of law. We are of opinion that the general denial, which clearly puts at issue all the facts, on the proof of which rests the right of the plaintiffs to recover, is not waived by the subsequent part of the same answer, which sets up the defendant's agency as a defence against the action. The two pleas are not inconsistent with each other. 3 *Martin, N. S.*, 270.

But it is contended by the appellees, that the record exhibits sufficient evidence that the drawer had no funds in the hands of the drawee, and that they are in such case excused from giving notice. Most of the leading cases in the books in which this matter of exception to the general rule has been considered and adjudicated upon, underwent a searching review by the Supreme Court of the United States, in the case of *French vs. The Bank of Columbia*. Chief Justice Marshall, in delivering the opinion of the court in that case, says, "It would seem to be the fair construction of these cases, that a person having a right to draw in consequence of engagements between himself and the drawee, or in conse-

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The plea of the general issue, which puts at issue all the facts on the proof of which rests the plaintiff's right to recover, is not waived by a subsequent plea which sets up the defendant's agency as a defence against the action. The two pleas are not inconsistent.

A person having a right to draw a bill of exchange, in consequence of engagements between him and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of

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the drawee, and not as coming within the exception, that the drawer, without funds in the hands of the drawee, is not entitled to notice of non-acceptance, and dishonor of his bill.

quence of consignments made to the drawee or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and therefore as not coming within the exceptions to the general rule." 4 *Cranch*, 156.

According to this opinion, which we consider as of the highest authority, it is rather too vague to say that the holder is not bound to give notice to the drawer merely for want of actual funds, when he might have it in his power to show that in consequence of previous arrangements he was authorised to draw. The judges of England are constantly expressing their regret that such an exception was ever tolerated, and their determination not to extend it any further, and lord Kenyon stated as the reason for the the exception, "because the drawer must know that he had no right to draw on the drawee." The evidence on this point came out incidentally, and the defendant had no opportunity to show all the circumstances under which he drew, and whether even without actual funds he had not an interest in being notified of the dishonor of his bill, more especially as he drew with directions to charge "as advised."

The drawer of a bill, when sued by the holder, is entitled to notice of its non-acceptance and dishonor, or by averments in the pleadings and notice at the trial, of the intention of his adversary to hold him liable, on the ground that he drew without authority and without funds in the hands of the drawee, notwithstanding the want of notice.

Not only is the evidence indirect and incidental, but the plaintiffs go counter to their own averment, that due notice was given, and although we are not prepared to say that direct evidence of a want of authority to draw, and want of funds, would be inadmissible under the pleadings in this case, yet we are of opinion that the defendant is entitled to some notice before or on trial of the intention of his adversary to hold him liable on that ground, notwithstanding the want of notice. Without such notice he cannot shape his defence to meet an unexpected attack. It is possible the defendant may have shown that he was not without authority to draw at all, and therefore, according to the dictum of lord Kenyon was entitled to notice. It is shown that the draft was given to discharge a debt by the Salt Manufacturing Company, and that the defendant read to the original payee part of a letter authorising him to draw. Although this fact has no bearing upon the case, as between the present holder without notice of the capacity in which the bill was drawn, yet it

might tend to show that the defendant had an interest in being notified of the dishonor of his bill. EASTERN DIST.
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Upon the whole, we do not consider the evidence sufficiently full and explicit to take the case out of the general rule, and to authorise us to class it under the exception.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and ours is in favor of the defendant as in the case of a non-suit, with costs in both courts.

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Where the buyer is deceived by the representations of the seller, in the quality of the article sold, and the defects are not such as might be discovered on simple inspection, but if known, it must be supposed the buyer would not have purchased, it is sufficient cause to rescind the sale and recover back the price.

This is an action on a contract to deliver a quantity of cypress timber, at the saw-mill of the defendants, on certain stipulations and conditions. The plaintiff alleges he delivered fifty trees, containing two hundred and sixty-five cypress logs of ten feet each, and was proceeding to deliver the remainder of one hundred trees, when he was forbidden by the defendants. That the logs delivered, amounted to four hundred and thirty dollars, according to his agreement, of which the defendant paid him one hundred dollars. He prays judgment for the balance.

The defendants admitted an agreement with the plaintiff to deliver the same logs mentioned, at a stipulated price, and

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that the plaintiff warranted them to be sound and merchantable ; that after receiving a few logs and commenced sawing them, it was discovered they were so unsound and in such a state of decay, as to be entirely unfit for use ; that they had paid one hundred dollars on account of said contract, and sustained damages to the amount of three hundred dollars by reason of the deception and fraud practised upon them, in all four hundred dollars, for which they pray judgment in reconvention.

The facts and the evidence of the case, are stated in the following extract from the opinion of the district judge who tried the cause in the first instance.

“The plaintiff sold the defendants, owners of a saw-mill, a raft of timber ; a special contract as to price is proved, viz. it was to be one dollar and seventy-five cents per log, if not more than one-third of the timber was pecky, and if more than one-third was pecky, the price was to be one dollar and sixty-two and a half cents per log. The contract was made by one Green; an agent of defendants, employed for that express purpose.

Green stated that he did not examine the timber ; an examination would require him to plunge his arm in the water, and his arm was broken out in sores ; he testifies that plaintiff represented the raft as first rate timber.

The timber was carried down to defendant's mill, and there made fast, and plaintiff received one hundred dollars on his contract. Four logs were sawed up the next day, and found so pecky, as in the language of witness, to be like honey comb, useless as mill timber. Plaintiff was notified to remove it, which he did not do ; the raft was suffered to break loose, and was carried away by a storm.

I assume that the evidence establishes,

1. That plaintiff knew the defective quality of the timber.
2. That it is usual and customary, in buying timber, to examine its quality and condition, by plunging the arm into the water, and feeling at the two ends of the trees, and that by this examination, it can be perfectly well ascertained what

the quality and condition of the timber is, whether it be pecky or worm-eaten, or not.

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3. That the timber, the subject of contract, was not examined, and turned out wholly useless and worthless.

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4. Whether or not plaintiff represented the raft as first rate timber, rests on the testimony of Green, who has a strong interest to deliver the defendants from the difficulty brought upon them by his non-fulfilment of his duty as their agent. Two other witnesses for plaintiff, are silent on this subject, but what most weakens his testimony, is the agreement for reduction of price in case more than one-third was found pecky; one-fourth is the usual proportion, and when it reaches to one-third, the timber is very bad.

In my view of the subject, it makes no difference whether plaintiff did or did not know the timber was bad, or did or did not represent it as good.

From the testimony of the witnesses, I assume that peckiness or being worm-eaten, is an apparent defect, one which is looked for and which can be discovered and known by that degree of examination which ordinarily prudent men of business make in purchasing the article.

Article 2647, says, that apparent defects are such as the buyer might have discovered by simple inspection. By simple inspection, I do not understand ocular regard, but such a degree of examination as an ordinary prudent man of business would make in buying the article. It is to be construed in a sense somewhat analagous to that which our laws require in inspection laws, but modified by the word simple, to a less rigorous examination, than the duty of an official act would require."

The plaintiff had judgment for the amount of his claim, to wit, the sum of three hundred and thirty dollars and costs. The defendants appealed.

Preston, for the plaintiff.

1. The testimony establishes the claim of the plaintiff, for which judgment was rendered. The judgment being rendered on a question of fact, should prevail in this case.

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The judge gave credit to the testimony of the other witnesses, rather than of the agent of the defendant, whose negligence caused all the difficulty and loss in this matter.

2. The questions of law applicable to the case, are conclusively stated in the opinion of the court. See *Louisiana Code*, article 1841, Nos. 3 and 4, also article 2497, as to apparent defects. 5. *Martin*, 300.

Roselius, for defendants.

1. It is conceded on all hands, and it cannot be denied, that these facts clearly bring the case within the provisions of articles 2496 and 2499 of the Civil Code. But the district judge considered, and it is now urged by the appellee, that the defects complained of are apparent defects, against which the plaintiff did not warrant. It is at least questionable whether these defects are, properly speaking, apparent. The timber was afloat on the Mississippi, and the defects covered by the water at the time of the purchase; it was necessary to make an examination under the water, in order to discover the indications of the decayed state of the timber, and even then, it required considerable skill and practice to form a correct judgment as to the extent of the defects. It appears to me, that defects which it requires so much labor, skill and experience to discover and find out, cannot be said to be apparent. *Tear vs. Suarez*, 7 *Louisiana Reports*, 519.

2. Be this, however, as it may, in the present case the defendant's agent was incapable to resort to the necessary precautions, and it was expressly stated that the contract was made on the faith of his representations: it must, therefore, be viewed in the same light as if the defendants had purchased timber which they had never seen, and which on delivery turned out to be utterly useless for the object for which it was purchased; surely it cannot be doubted, that in such a case the buyer could not be compelled to receive the property. Besides, in the present case, there is the strongest evidence that the plaintiff knew of the defects in the timber at the time of the sale; he, therefore, was guilty of fraud in making a wilful misrepresentation with respect to the quality of the

timber. Hence the provisions of articles 2523-4-5 of the *Louisiana Code*, are applicable to the case. *Duranton Droit Français*, vol. 9, liv. 3, titre 6, du contract de Vente, Nos. 307-8-9-10, et seq.

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3. The evidence fully establishes that the defendants sustained at least one hundred dollars damage, in consequence of the fraud practised by the plaintiff, for which amount they are entitled to judgment on their plea in reconvention.

Mathews, J., delivered the opinion of the court.

This suit is brought to recover the value of a certain number of logs sold by the plaintiff to the defendants, for the purpose of being sawed into planks and scantling. Judgment was rendered in the court below for the former, from which the latter appealed.

The contract is clearly established by the evidence of the case, and the defence turns altogether on the warranty by the seller, of the soundness of the timber by him sold.

It appears that the contract was made for the defendants by their agent, who was introduced on their part as a witness in the cause. He and the witnesses for the plaintiff, do not disagree as to the conditions of the contract, so far as they are proved by all. But the agent of the defendants who actually made the agreement, testifies to facts more than those established by the witnesses of the plaintiff. He says that he was unable to examine the logs at the time of purchase, in consequence of the soreness of one of his arms, and that he made the bargain on the guaranty of the seller, that they should equal in soundness that which was stipulated in the contract; in other words, that they should answer the purposes for which they were bought. The testimony, however, shows, that when tried at the saw-mill they proved to be defective in a much greater degree than was contemplated by the purchasers, and were wholly unfit for the uses intended, being entirely rotten.

We see no reason to discredit the testimony of the witness of the defendants, and if he be believed, it is evident that the

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Where the buyer is deceived by the representations of the seller, in the quality of the article sold, and the defects are not such as might be discovered on simple inspection, but if known, it must be supposed the buyer would not have purchased, it is sufficient cause to rescind the sale, and recover back the price.

timber was taken on the warranty of soundness, either express or implied, to which the seller was bound. To discover the defects, a peculiar kind of examination was necessary, and the agent was unable to make it. The present does not, therefore, come within the cases provided for by law, where defects in articles of commerce are discoverable by simple inspection. See *Louisiana Code*, art. 1841 and 2497. The buyers in the present instance, were deceived by the representations of the quality of the articles sold by the vendor, and whether they were thus deceived by error or design on his part, cannot vary the rights of the parties *in foro leges*, because the defects were not discoverable immediately on inspection, and they were such, that it must be supposed that the buyers would not have purchased, had they known of them. See *Louisiana Code*, art. 2496. The legal and moral principles assumed by the judge *a quo*, in relation to contracts of sale, are probably all sound and correct; but according to our belief of the facts of the present case, we are of opinion that they are not applicable to it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled; and it is further ordered, adjudged and decreed, that the contract between the parties be cancelled and set aside, and that the defendants do recover from the plaintiff one hundred dollars, a part of the price which was paid by them to him, (before the defects and total uselessness of the timber was discovered,) with costs in both courts.

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The word *estate*, used in the English text of the Civil Code, has the same meaning as the term *succession* in the French text. It is defined to be, "the estate, rights and charges, which a person leaves after his death." *Old Civil Code*, page 144, article 2.

Vacant estates are to be administered by curators appointed for that purpose. But prescription runs against a vacant estate, though no curator has been appointed.

A vacant estate is a fictitious being, representing in every respect the deceased, who was the owner of the estate, until the acceptance or renunciation of the inheritance by the heir, and is prescribed by the lapse of ten years before any act of acceptance.

Where property of a vacant estate has been sold by the surviving partner of the community, and held by the purchasers under a just title, and possessed in good faith, *animo dominorum* for ten years, the claims of the heirs of the succession, afterwards set up to the property, will be barred by the prescription of ten years.

If an inchoate right once begins under the existing laws of prescription, a subsequent law cannot be made to operate so as to destroy it.

The provisions in the Louisiana Code, articles 934 and 936, calling the heir to the inheritance, and giving him the seizin of the succession, immediately on the death of the ancestor, do not destroy the provision concerning vacant estates. No one can be compelled to accept a succession, and until acceptance or renunciation, the rights of the heir as regards inheritance, seizin and possession, &c., are suspended.

The provision in the Civil Code of 1808, defining a vacant estate to be a fictitious being representing the deceased, is not contained in the Louisiana Code, promulgated the 20th June, 1825.

An action in which the plaintiffs simply allege themselves owners of property in common with the defendants, cannot preclude the latter from disputing the rights of the former and setting up title in opposition to the claim made. It is, in this respect, an action of revendication and not of partition, and involves the prescription of ten and twenty years.

EASTERN DIST. A vacant estate being a fictitious person representing the deceased, according
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The law protects rights acquired by third persons, to property of an estate which is afterwards accepted by the heir, between the opening of the succession and the time of such acceptance; and amongst these rights, are those acquired by prescription.

This is an action of revendication. The plaintiffs, heirs and legal representatives of Marcia Davis, deceased, late wife of George W. Dewees, on the 13th of March, 1833, instituted suit to recover the one undivided moiety of four and a half lots of ground in New-Orleans, in the possession of the defendants.

The plaintiffs show, that in the year 1800, George W. Dewees and Marcia Davis, were married in the city of Philadelphia, and shortly afterwards removed to this state, then Territory of Orleans. That during their residence here and the existence of the community of acquets and gains, they acquired the lots and property in question. While the community lasted, and during their possession of said property, in the month of September, 1813, Marcia Davis, the wife of Dewees, died without issue. The present plaintiffs, the descendants and heirs of her father and mother, claim her half of the community property in possession, and belonging to the spouses at her death.

No inventory was ever taken of the succession of the wife, or partition made of the community property. In 1815, Dewees sold the property in question at private sale, to W. C. Withers and Harvey Elkins. In 1817, Elkins sold to his co-proprietor, Withers, his half of the ground. Since Withers' death, in 1830, Joseph M. Kennedy purchased the disputed premises from the universal legatees of Withers. In 1832, he again sold to Harvey Elkins.

Elkins pleaded a general denial, and avers that he is in possession under a just title and in good faith. He calls Kennedy in warranty.

Kennedy pleaded the general issue to the petition and answer calling him in warranty. He denies the heirship

and right of the plaintiffs to sue, and sets up his title as derived from the universal legatees of Withers, whom he calls in warranty. These last warrantors called in Elkins again, for the undivided half of the lots he had sold to Withers.

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Kennedy amended his answer, and pleaded the prescription of ten years, against the plaintiffs' right to recover. He averred that Withers and Elkins acquired the property from Dewees, in good faith and by a just title. That the succession of Mrs. Dewees is vacant, the heirs being unknown and absent from the State of Louisiana at her death; and that vacant estates are prescribed in ten years.

Upon these pleadings and facts, the case was tried by agreement, as between the plaintiffs and Withers and Elkins, the immediate vendees of Dewees.

The district judge presiding, decided that the defendants having acquired in 1815, under a just title and in good faith, the property in question, and no attempt having been made to accept the succession of Marcia Davis, until the institution of this suit in 1833, that the defendants have acquired a title by prescription against the succession as a vacant one, which entitles them to be quieted in their possession.

Judgment was rendered for the defendants. The plaintiffs appealed.

L. C. Duncan and *J. Slidell*, for the plaintiffs.

1. This is an action of partition, and as such, subject only to the prescription of thirty years. 3 *Martin*, 97.

2. The plaintiffs, as absentees, can only be bound by a prescription of twenty years. *Old Civil Code*, page 86, art. 67.

3. If the succession was a fictitious being representing the deceased in every thing, then prescription is suspended against her heirs until the death of Dewees, as action would be prejudicial to her husband. *Civil Code*, page 486, art. 60.

Eustis, for the defendants, called in warranty.

1. The succession of Mrs. Dewees, from the period of her decease to the institution of the present suit, was a vacant

EASTERN DIST. February, 1836. succession, *heriditas jacens* of the civilians. *Civil Code of 1808*, page 172, art. 118. *Louisiana Code*, art. 1088. 1

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Salgado, page 219, chap. 32, sect. 20-1. *Code Napoleon*, art. 811-12.

2. The vacant succession represents the person of the deceased, until it be accepted. *Civil Code of 1808*, page 162, art. 74. 1 *Salgado*, page 218, chap. 32, sec. 3-4.

3. Ten years prescription is sufficient to protect the defendants in their property: they having possessed in good faith and under a title *translatif de propriété*. *Code*, lib. 6, tit. 30, law 22, sect. 11, *de jure deliberandi*. *Civil Code of 1808*, page 86, art. 62. *Louisiana Code*, art. 3492. *Code Napoleon*, art. 2259.

4. The heir accepting the vacant succession, takes it *cum onere*, subject to all the rights of prescription acquired against it. 1 *Salgado* *loc. cit.* sect. 25. *Civil Code of 1808*, art. 72, page 160. *Ibid.* art. 95, page 164. *Louisiana Code*, art. 1024. *Code Napoleon*, art. 790. *Code*, lib. 6, tit. 31, *de repudiendâ vel abstinendâ hæreditate*.

Conrad, on the same side, contended.

1. That the succession of Marcia Davis, late wife of G. W. Dewees, was vacant, and that the action of the plaintiffs was prescribed by the lapse of ten years. *Civil Code*, page 384, art. 62, 67. 1 *Vazeille, Traité des prescriptions*, No. 73.

2. It is attempted to be shown that this is an action of partition, and only barred by thirty years prescription. But this is not an action of partition; none of the formalities required for a judicial partition have been fulfilled. No inventory, appraisement, report of experts, or prayer for a partition in kind or by licitation, appears in the pleadings or the record.

3. An action of partition is instituted by one part owner against another, to compel a division of property acknowledged to be owned and held in common. This suit is brought for the express purpose of recovering and having the plaintiffs recognized as owners of one half of the property in question. The former action, it is admitted, is imprescriptible. This

one is barred by the prescription applicable to possessors under a just title and in good faith.

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Hennen and Mazureau, for Kennedy in warranty.

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D. Seghers, for the plaintiffs in reply.

1. It is not denied that under the *Old Civil Code*, a vacant succession was considered a fictitious being, representing the deceased, and that prescription run against it. Nor is it denied that it was only by his acceptance that the heir became of right seized of the property, rights and actions, of the deceased.

2. But it is contended by the plaintiffs, that the adoption of the *Louisiana Code*, in lieu of the Civil Code of 1808, has made a material change in this part of the law. By the *Louisiana Code*, the heir is considered as having succeeded to the deceased, and consequently to all his rights from the moment of his death. See *Louisiana Code*, art. 934 *et seq.* 2 *Louisiana Reports*, 302.

3. The *Louisiana Code* was promulgated and in force on the 20th June, 1825. Admitting for argument's sake, that prescription began to run from the 30th July, 1815, the day of the sale by Dewees, the surviving husband, there were still forty days wanting on the 20th June, 1825, to complete the prescription of ten years against the vacant estate.

4. It is by no means clear that prescription *begins* to run against a vacant estate, for the law pre-supposes a case where the prescription *had begun* against the deceased in his lifetime, and continued running after his death against his succession.

5. Be this as it may, it is contended that on the 20th June, 1825, by the adoption of the *Louisiana Code*, that fictitious being, against whom prescription runs, was no longer in existence. From that day, the heirs of Marcia Davis were seized of the rights and possession of her estate. From that day prescription ceased to run; especially as many of the heirs were minors. *Louisiana Code*, 934, 936, *et seq.*

6. By the *Louisiana Code*, the heir being seized of the succession in right, is considered as the heir so long as he

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Mathews, J., delivered the opinion of the court.

In this case the plaintiffs claim as heirs of Marcia Davis, late wife of George W. Dewees, an undivided half of certain real property described in their petition which made a part of the matrimonial community of acquets and gains acquired during the marriage, and to which they allege title as having succeeded to the rights of Mrs. Dewees, who died in 1813.

The answers of the defendants contain, all of them, a general denial of the facts alleged in the petition, and in many of them prescription of ten and twenty years is pleaded. The court below decided the cause in their favor on the plea of prescription, and the plaintiffs appealed. The case has been argued before us solely on this ground, and we shall consequently examine no other.

Dewees, the husband, remained in possession of the property which had been acquired during the marriage, without taking any steps tending to show that it belonged to the matrimonial community, by inventorying the succession of his deceased wife, or making any attempt to cause a division of the community to be made, either amicably between him and her heirs, or by legal process. Indeed her heirs seem to have been entirely unknown to the public, until about the time of the institution of the present action in 1833.

Dewees continued in possession of the premises now in dispute, in the manner above stated, from the death of his wife in 1813, until the 30th of July, 1815, when he sold them to W. C. Withers and H. Elkins. The latter, afterwards, for a valuable consideration, conveyed his rights in the property to the former, &c. The defendants hold under title derived from these purchases.

The present suit was begun not before the 13th of March, 1833, and for any thing appearing to the contrary, was the first time that any claim was made by the plaintiffs as heirs of their deceased relation, to the property now in litigation, having never previously done any act which can be construed

as an acceptance of her succession, either absolute or with benefit of an inventory.

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These are the facts on which the plea of prescription is founded. It now remains for us to ascertain whether it can be supported by the provisions of the laws which were in force at the time of the sale from Dewees to Withers and Elkins, relating to the acquisition of things held under a title translativè of property, and possessed in good faith; and whether the rules then existing have been changed by the La. Code of 1825, in such a manner as to affect injuriously the claim of the defendants.

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We think it may be safely assumed as a truth, induced by comparison, that the provisions of the laws previously in force in this country, and those of the Civil Code of 1808, are in accordance on the subject of prescriptions; especially in relation to that now pleaded, and all things necessary to give it effect and validity. But if any material alterations were made by the posterior legislative enactments, they must prevail. We shall, therefore, look mainly to our own codes of law, as guides in the question under consideration.

The prescription pleaded, is assumed as one running against a vacant succession, or *hereditas jacens*, as representing in all respects the deceased owner. To make good this plea, it must be shown that the succession claimed by the plaintiffs was vacant for ten years after the sale to the defendants, and that it represents the deceased owner, and not the heirs, according to legal intendment. Also, that the title under which the defendants hold, is one translativè of property, and that they and those under whom they claim, have possessed it peaceably and in good faith, *animo dominorum*, the time required to give title by prescription.

The truth of these last propositions is fully ascertained by a mere reference to the facts stated in the commencement of this opinion. The only question remaining to be solved, is, whether according to a just interpretation of our laws, they must produce the same effect on the rights of claimants to a succession in the capacity of heirs, which has remained vacant during the time necessary to acquire by prescription, that

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The word *estate* used in the English text of the Civil Code, has the same meaning as the term *succession* in the French text. It is defined to be, "the estate, rights and charges, which a person leaves after his death." *Old Civil Code, page 144, article 2.*

Vacant estates are to be administered by curators appointed for that purpose. But prescription runs against a vacant estate, though no curator has been appointed.

would have been operated on the rights of an owner living and present in the state?

The statement of this question seems to take for granted, that the succession in the present instance was vacant. It will, perhaps, be well to support this assumption by quotations from the law.

The definition of a vacant estate, is found in the Old Civil Code, page 172, art. 118, and appears to be clear and explicit. "An estate is said to be vacant, when no person claims its possession, either as heir or under any other title." The word estate used in the English text, has the same meaning as succession in the French, and has this signification given to this word in the Old Code, page 144, art. 2, viz: "The estate, rights and charges, which a person leaves after his death," &c.

Now it is fairly deduceable from the facts of this case, that no person claimed the estate of Mrs. Dewees, from the time of her death, in 1813, until the institution of the present suit in 1833. It was, therefore, vacant during the whole of that period. We are thus brought to the consideration of the principal question in the cause: Can title be acquired to any part of a vacant estate, by showing one translativè of property given by a person, not the owner, and uninterrupted possession during the length of time required to complete prescription? An affirmative answer to this question, is found in express terms, in the Code already cited, in article 62, page 486. Vacant estates, according to legal provisions, are to be administered by curators appointed for that purpose. The article last cited, declares that prescription runs against a vacant estate, though no curator has been appointed. It is expressed in the following words: "Prescription does not run against a beneficiary heir with respect to the debt due him by the estate. But it runs against a vacant estate though no curator has been appointed for said estate." This article is found in the section of the Code which treats of the causes which suspend or interrupt prescriptions, and has relation both to the prescriptions by which property may be acquired and those *liberandi causà*; and although from the

first clause in it, being clearly applicable to the last kind of prescriptions, it might be urged that the subsequent clause also relates to them only, yet it is general in its expressions and cannot be limited by any just and reasonable interpretation.

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The general belief, however, in relation to prescriptions *acquirendi causâ* is, that they can only run against an owner of full age during his lifetime, and persons (in the same category) who represent him after his death, and that it would be absurd to make them run against mere inanimate matter or things constituted without reason or moral agency. It must indeed be admitted, that there is something paradoxical in the provisions of our law, which declare that a moral agent who is dead, shall be represented in all respects by unthinking and inert matter. But this is a fiction in our jurisprudence, and legal fictions are not unusual in many systems of law, adopted for the preservation of rights to property, and in aid of the administration of justice; and when they subserve these purposes, it is a matter of no consequence what may have been the motives which led to their introduction, whether they had their first origin in the tricks of the learned and cunning, with the intention of forcing the ignorant to pay them for their services in conducting litigation, or whether they were introduced with a sole view to the good of the public, by preventing legal contests, and thus quieting owners in their rights and possession of property. The fiction in the present instance appears to us to be of the latter class, but whether or not it makes a part of laws by which the community must be bound. In its prescriptive operation it has evidently a tendency to the desirable ends just stated. This is the first time that the courts of judicature of the state have been directly called upon to give an interpretation to and apply the rules resulting from this fiction to a case. And this is probably the reason why we approach the subject with diffidence, as it belongs to the human mind to be cautious and circumspect in admitting the truth of new doctrines.

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A vacant estate is a fictitious being, representing in every respect the deceased, who was the owner of the estate, until the acceptance or renunciation of the inheritance by the heir, and is prescribed by the lapse of ten years before any act of acceptance.

Where property of a vacant estate has been sold by the surviving partner of the community, and held by the purchasers under a just title, and possessed in good faith, *animo dominorum* for ten years, the claims of the heirs of the succession, afterwards set up to the property, will be barred by the prescription of ten years.

The Code of 1808 declares, "that nobody can be compelled to accept a succession in whatever manner it may have fallen to his share," &c., page 160, article 71. "Until the acceptance or renunciation the inheritance is considered a fictitious being representing, in every respect, the deceased, who was the owner of the estate," page 162, article 74. And we have already seen that according to article 62, page 486 of the same code that prescription runs against a vacant succession. We have now obtained, from a statement of the facts of the case and from the laws as they were in force to the 20th of June, 1825, all the postulates necessary to support the judgment of the court below, viz: From the facts that the defendants hold the property in dispute under a just title or one translativ of property, and that they have been in peaceable and uninterrupted possession for more than ten years, as possessors *animo dominorum*. From the law, according to the definition of the Code, that the succession of Mrs. Dewees remained vacant from the year 1813 until 1833; that this succession being so vacant, is a fictitious being representing her in every respect, and that prescription runs against it.

We will now, before examining and passing on the points filed on the part of the plaintiffs, proceed to a comparison of the provisions of the new *Louisiana Code* with those of the *Old Civil Code* of 1808, on the same subject of successions, which the plaintiffs allege have introduced rules calculated to repeal those which previously existed, and which properly interpreted will have the effect to destroy the claim of the defendants, as their title by prescription was not complete by lapse of time at the period of the adoption of the Code of 1825.

Previous, however, to commencing this investigation and comparison, it may be proper to state, that we are not aware of any material difference between the provisions of the two codes, in relation to the prescription of ten and twenty years, touching real property, except the shortening of it in regard to slaves. It might also be seriously questioned, whether any provisions of posterior laws can justly be so construed,

in regard to prescription, as to produce an abrogation of the rules previously established for the acquisition of property. EASTERN DIST. February, 1836.

They certainly operate on the rights of parties, rather than on remedies to enforce obligations. If a right has once begun to exist, although it may be inchoate and not perfected, we are not able to conceive how, by any rational interpretation, consistent with just rules on this subject, a subsequent law can be made so to operate, as to destroy it. In the present case, allowing the promulgation of the new Louisiana Code to have been made on the 20th of June, 1825, only forty days were required to complete the title of the defendants, by the prescription of ten years. But this perhaps is not one of the *minera de quibus non curat lex*. DAVIS'S HEIRS vs. ELKINS ET AL. If an inchoate right once begins under the existing laws of prescription, a subsequent law cannot be made to operate so as to destroy it.

The alteration made in the last code concerning successions, on which the counsel for the plaintiffs relies, is that provision which gives seizin to the heir on the death of the ancestor.

The articles of the Louisiana Code which relate to this subject, are very strong in their expression. Article 934 declares that "a succession is acquired by the lawful heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds:" 936, "the heir being considered seized of the succession from the moment of its being opened, the right of possession which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession."

If these articles be strictly construed, they will defeat and annul all those which relate to vacant estates, and seem to contravene those also on the subject of acceptance and renunciation of successions. One of the rules of interpretation is, that laws in *pari materia* must be construed together; and another is, that effect must be given to all their provisions, unless in doing so, it would result in gross absurdity. If they cannot be reconciled, which of them must yield?

Let us now look to other articles of the code, in relation to successions. It is declared by article 970, that "no one can be compelled to accept a succession, in whatsoever manner it may have fallen to him. The definition of a vacant

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succession found in the Louisiana Code, is substantially the same as that which we have cited from the old Civil Code, article 1088: "a succession is called vacant when no one claims it, or when all the heirs are unknown, or when all the known heirs to it have renounced it." Here it may be pertinently asked, how a person can refuse to accept a thing of which the law has given to him absolute seizin, both in relation to rights and possession? or rather, what necessity for such acceptance, and how can it effect his rights? and if the heir, whether known or unknown, absent or present, has by mere operation of law, full seizin of the succession, both as to rights and possession, how is it possible that there can be any such thing as a vacant estate in this country? Yet the implication from the article in relation to acceptance, is irresistible that such acceptance is necessary to perfect the title of the heir to the inheritance, at all events he probably cannot be involved in any of the obligations of the ancestor to other persons, without acceptance; and it is clear from the other article cited, that there may be such a thing as a vacant estate.

The provisions in the Louisiana Code, arts. 934 and 936, calling the heir to the inheritance, and giving him the seizin of the succession, immediately on the death of the ancestor, do not destroy the provision concerning vacant estates. No one can be compelled to accept a succession; and until acceptance or renunciation, the rights of the heir as regards inheritance, seizin and possession, &c., are suspended.

The provision in the Civil Code of 1808, defining a vacant estate to be a fictitious being representing the deceased, is not contained in the Louisiana Code, promulgated the 20th June, 1825.

The article 940 seems, however, in some degree to prevent the conflict, which would have been inevitable between the articles 934 and 936 and the articles 970 and 1088; for it suspends all the rights of the heir, until he decides whether he accepts or renounces the succession. This article, by virtually annulling or rendering inoperative the previous articles 934 and 936, relieves us from the troublesome task of solving the questions above stated, and endeavoring to reconcile those provisions of law so apparently contradictory, and leaves the main question in the cause, nearly in the same predicament in which it was under the old Civil Code of 1808. We will, therefore, desist from any further consideration of the provisions of the Louisiana Code, in relation to the questions which have been raised by the pleadings in the present case. It does not appear that the fictitious being created by the Civil Code of 1808 has been kept alive by any provision of that of 1825. But in our opinion, it lived long enough, and represented the ancestor of the plaintiffs a

length of time sufficient to give the defendants a title to the property in litigation by prescription, especially as the same provision, allowing prescription to run against a vacant estate, exists in both codes. See *Louisiana Code, article 3492*.

We come at last to the examination of the objections made in the points filed, on the part of the plaintiffs, in this court.

The first is, that this is an action of partition, and as such subjected only to the prescription of thirty years.

2. That the plaintiffs, as absentees, can only be bound by the prescription of twenty years.

3. If the succession was a fictitious being, representing the deceased in every thing, then prescription was suspended against her heirs until the death of Dewees, as any action brought by her would be prejudicial to her husband.

In answer to the first of these objections to the prescription of ten and twenty years, it suffices to observe, that the primary object of this suit appears to be to settle the right of property in the disputed premises, between the parties litigant. If this were determined in favor of the plaintiffs, these being joint proprietors with the defendants, a partition might, perhaps, have been decreed in the same suit, according to the prayer of the petition. But simply stating themselves as owners in common with the defendants, cannot preclude the latter from disputing the rights of the former, and setting up title in opposition to the claim made. It is in this respect, primarily, an action of revendication, involving the prescription of ten and twenty years.

The second point is completely answered by the law which makes the fictitious being the representative of the deceased, not of the heirs.

The third involves an absurdity in its very terms, by considering Marcia Davis as the wife of Dewees, after the marriage had been dissolved by the death of the former. This error can only be accounted for by the paradoxical attributes given to the fictitious being by creation of law; although it may be admitted that some individuals are extremely enamoured with their property, it is hard to conceive on what principles a tract of land may be admitted to hold

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An action in which the plaintiffs simply allege themselves owners of property in common with the defendants, cannot preclude the latter from disputing rights of the former, and setting up title in opposition to the claim made. It is, in this respect, an action of revendication and not of partition, and involves the prescription of ten and twenty years.

A vacant estate being a fictitious person, representing the deceased, according to the Civil Code, prescription runs against it, instead of the heirs.

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the place of a man's wife. The general expression in every respect must not be so construed as to lead to absurdities not supportable on any rational grounds, and in violation of the order of nature.

Some reliance seems to have been had by the counsel of the plaintiffs, on the right granted by law to heirs, to accept an inheritance at any time before they may be precluded by prescription, and that such an acceptance relates back to the time when the succession was opened. But the law protects rights legally acquired to any part of it by third persons, between the opening of the succession and the time of acceptance, and amongst those rights is expressly secured, that which may have been acquired by prescription.

We have been referred to two cases to be found in 7 *Louisiana Reports*, one at page 216, and the other at page 292.

In the first of these it was said, that on the death of one of the spouses, the community, in a legal sense, is unquestionably terminated. Each party is seized of one undivided half of the property, and the survivor cannot validly alienate the part not belonging to him. This is true, that the portion not belonging to the survivor, cannot be by him sold and conveyed, so as, *ipso facto*, to give a legal and valid title to the purchaser, because the seller had none. But the question, whether a deed of sale made by him may not form the basis of prescription, is not touched in the opinion given by the court in that case.

The opinion in the other case cited, relates to a succession which was opened under the new Code, and the present case is decided entirely on principles established in the old Civil Code.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

The law protects rights acquired by third persons, to property of an estate which is afterwards accepted by the heir, between the opening of the succession and the time of such acceptance; and amongst these rights, are those acquired by prescription.

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GLEISSE & HOLLAND VS. WINTER.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a possessory action to regain possession of a space of ground situated behind the Levee, and between it and the public street in the city of Lafayette, where the plaintiff was in actual possession more than a year, as a riparian proprietor, (the *locus in quo* being susceptible of private ownership) : *Held*, that the question, whether it be in fact the plaintiff's property, or has been *destined to public use*, is one of title which cannot be inquired into. No testimony is admissible except as to the *fact* of possession and disturbance.

A corporation can maintain a petitory action, to remove nuisances and clear the banks of rivers, by showing that the land occupied is *destined* to public use.

There is no particular form or ceremony necessary in the dedication of lands to public use. If the assent of the owner is shown, and the land is actually used for the public purposes intended by the appropriation, it is sufficient.

This is a possessory action. The plaintiff, Gleisse, alleges he was in peaceable possession, for more than a year, of a lot of ground in the Nuns' Faubourg, (now city of Lafayette) lying between square No. 1 and the river. That one Joshua Winter forcibly and illegally took possession of said lot, under pretence of authority from the president and board of council of the city of Lafayette, is breaking up the soil, digging holes, &c., though forbidden by the tenant of the plaintiff. He prays judgment restoring him to possession and for damages.

J. H. Holland instituted his possessory action against the defendant at the same time, alleging he was in peaceable possession of a lot of ground in the city of Lafayette, (formerly the Nuns' Faubourg,) situated between New Levee-street and the Mississippi river at high water mark, "*and in length about one hundred and twenty-three feet on New Levee-street.*" That the defendant, Winter, professing to act

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under the authority of the city of Lafayette, entered upon the premises at various times, disturbed him in his possession by removing wood and other articles, planting posts, breaking and digging the soil, &c., wherefore he prays that the said Winter and the corporation of Lafayette be cited and enjoined to leave him in quiet possession of said premises, &c."

These two cases were consolidated.

The corporation of Lafayette pleaded a general denial, and that the street, levee and bank of the river in front of plaintiff's property has always been in *the possession and use of the public*, by the act incorporating the city of Lafayette, and placed under its charge.

The corporation further alleges that it employed the defendant, Winter, to free the street, levee and bank of the river from obstructions and incumbrances, for the convenience of passengers and the commerce of the country. That the plaintiffs have opposed it in the discharge of its duties, to its damage five hundred dollars, for which it prays judgment in reconvention, and that the plaintiffs be enjoined and restrained from incumbering and obstructing the street, the levee and the bank of the river in front of their property, &c.

Winter pleaded the general denial, and denied that he had trespassed on the private property of the plaintiffs, but was acting as an officer of the corporation of the city of Lafayette, and under its authority in removing incumbrances and obstructions from the public streets, the levee and bank of the river, for the purpose of allowing the free use thereof to the public. He prays judgment against the plaintiffs, that they be enjoined from incumbering the disputed premises and from resisting him in the discharge of his public duties, &c.

Upon these pleadings and issues the parties went to trial.

Depassau, witness for plaintiffs, says he has known the property belonging to the plaintiffs, since 1818. That Holland purchased from Derbigny, and that the possession of the plaintiffs has been public and peaceable ever since he has known it. That Gleisse has possessed the space between the levee and the river, in front of his property, by keeping up the

roads and levees, according to law ; that he filled up said space, which was low and on which water stood, and used it for a wood yard ; and also, by erecting sheds which were hired to persons who sold oysters ; and that he continued to do so undisturbed, until he was interrupted by order of the city council of the city of Lafayette. That Holland filled up the space now claimed, which was formerly low and wet, and has possessed and owned the property, by keeping up the levee, and making it and the road at very great expense, and by occupying said space as a wood-yard. That the property of Mr. Holland lies between Tchoupitoulas-street and the public road, or continuation of New Levee-street, and that between this last road and the levee, the space has always been occupied by the plaintiff, Holland, as a wood-yard.

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Witness being asked if the space between the road and the levee in front of the property of the plaintiffs has not always been occupied by them, and if he has ever known any other person to make a permanent use of the same, says, that goods have been landed there by other persons, and used for the occasion, but they would not have been allowed to occupy the same permanently.

Being asked if the space between the road and the river in front of the plaintiffs' property has not always been made use of as a public landing for materials and goods, says, that it was used as other places along the river, and for the purpose of landing goods and produce, but he does not know of any person having placed goods there permanently, without the permission of the proprietors. This property was generally occupied, that of Gleisse with lumber, and that of Holland as a wood-yard.

Pilie, city surveyor and witness for defendant, was shown the plan of the Nuns' Faubourg, made in 1810, by B. Lafon, by which it was sold out in lots. That while the Nuns' Faubourg was under the jurisdiction of the city of New-Orleans, the corporation always claimed the right for the public, and exercised the same over the space in front of said faubourg ; and which is marked on said plan, from the interior line of the street or *grand route*, to the water's edge.

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The city claimed the public use of said space, for the purpose of landing and shipping goods ; the right of taking earth for the batture in front, was reserved and confined to all the inhabitants of the faubourg. The road or street, marked on the plan *grand route*, was used for carriages and passengérs, and the remainder of the space to the water's edge, was for landing boats and vessels.

Other witness testified in substance to the same.

The deeds of sale, from the Nuns to the vendors of the plaintiffs in 1810, contained each the following clause, to wit: " Les dames vendresses établissent pour clauses et conventions générales et expresses des ventes partielles, qu'elles font présentement de leur habitation, que les acquereurs des trois premiers lots en profondeur à partir du fleuve seront chargés de l'entretien de la levée et du grand chemin, et jouiront en commun des droits de propriétaires riverains qu'ils seront néanmoins tenus de laisser prendre sur la batture, les terres dont les propriétaires des lots plus éloignés du fleuve, pourront avoir besoin pour remblayer leurs terrains pour y bâtir."

The district judge, after hearing all the evidence, was of opinion that the *locus in quo*, or disputed premises was a public place, destined to the public use, and not susceptible of ownership.

It was decreed that the plaintiffs be perpetually enjoined from opposing the defendants in regulating the use of the premises in question for the public, and the former remove all the obstructions therefrom and pay costs. From this decree the plaintiffs appealed.

Strawbridge, for the plaintiffs and appellants.

Preston, for the defendants.

Bullard, J., delivered the opinion of the court.

This case cannot be distinguished from that of *Depassau vs. Winter et al.* decided at the June term, 1834. 7 *Louisiana Reports*, 1. When that case was argued the bench was not full ; some doubts having since arisen, we have reconsidered it with much deliberation.

It is contended that the defendants having shown a destination to public use of the *locus in quo*, no possession of it can be acquired, and no possessory action maintained. This argument assumes as a fact that there has been a destination to public use, while the principal if not the sole question in the case is, whether evidence of that fact be admissible in this action, it being merely possessory. There is, therefore, the appearance of reasoning in a circle. The actual possession or occupancy for more than a year is shown, and the deed from the Nuns proves the plaintiffs to be riparian proprietors. It appears to us that the *locus in quo*, being situated back of the levee, is from its natural position susceptible of private ownership. The question, whether it be in fact the property of the plaintiffs, or whether it has been devoted to public use, is in our opinion essentially one of title, and the *Code of Practice*, article 53, declares that in possessory actions no testimony shall be admitted except as to the fact of the possession or as to the disturbance, and all testimony relative to property shall be rejected. This doctrine was recognised and applied by this court in the cases of *Williams vs. Kelso*, and *Thomas vs. Baillio*, 7 La. Reports, 406 and 410.

But, it is contended further, that the defendants are without remedy if turned over to a new action as plaintiffs, and that they cannot maintain a petitory action. The right of corporate bodies to maintain such an action has several times been recognised in this court, and especially in the case of the *Trustees of Natchitoches vs. Coe*. 3 N. S., 140.

But, even admitting that the question of a dedication to public use may be examined in this case, it is perhaps doubtful, according to the evidence, whether such dedication in point of fact has been shown. It is not proved to have been used by the public under such a dedication. The Supreme Court of the United States in the case of the *City of Cincinnati vs. White*, said, "There is no particular form or ceremony necessary in the dedication of lands to public use. All that is required is the assent of the owners of the land, and the fact of its being used for the public purposes intended by the appropriation. This was the doctrine in the case of

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A corporation can maintain a petitory action, to remove nuisances and clear the banks of rivers, by showing that the land occupied is *devoted to public use*.

There is no particular form or ceremony necessary in the dedication of lands to public use. If the assent of the owner is shown, and the land is actually used for

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the public pur-
poses intended
by the appropri-
ation, it is suffi-
cient.

Jarvis and Dean, already referred to, with respect to a street, and the same rule must apply to all public dedications." 6 *Peters' Reports*, 431.

Upon this last point we express no opinion, but upon the whole we think the question of dedication ought to be left open, and in the mean time the plaintiffs maintained in their possession.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; and it is further ordered, that the plaintiffs be maintained in their possession, reserving to the defendants the right, if any they have, to institute any legal proceedings for the purpose of establishing the rights claimed by them in favor of the city of Lafayette, or the public in general; the defendants and appellees to pay costs in both courts.

ROUQUETTE vs. HIS CREDITORS.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The transferee of a mortgage standing in the name of the original mortgage creditor, may exercise his right of mortgage on making proof of the transfer, without having the mortgage enregistered in his own name.

On the 25th of November, 1834, the syndic of the insolvent filed his tableau of distribution of the proceeds of the sale of the property surrendered, and took a rule for all persons interested, to show cause on or before the 8th December following, why the said tableau should not be homologated, and the creditors paid accordingly.

In the mean time, Toby made opposition on the ground that he was the holder of two promissory notes, for one

thousand dollars each, payable to Beranger, and by him endorsed to this opponent. That when said notes were executed to Beranger, a mortgage was taken on six lots of ground to secure the payment thereof. This property was sold by the syndic, and the proceeds are in his hands. Toby alleges he is subrogated to all the rights of the mortgagee, Beranger. He had judgment to be placed on the tableau as a privileged and mortgaged creditor, and to be paid accordingly out of the proceeds of the mortgaged property. The syndic appealed.

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Canon, for the appellant.

Carleton and *Lockett*, contra.

Martin, J., delivered the opinion of the court.

This case comes before us on the decision of the Parish Court, on an opposition filed by T. Toby, to the tableau of distribution made by the syndic of the insolvent. The court ordered Toby to be placed on the tableau as a mortgage creditor, which recognised his lien or privilege on the proceeds of the sale of certain property which had been mortgaged to him. From this decision, the syndic appealed to this court. His counsel contends that the Parish Court erred in the decision it gave.

It appears from the facts exhibited in the case, that the mortgage in question stands recorded in the name of the original mortgagee, to whose right Toby claims to have been subrogated, as purchaser or transferee of the debt, which was secured by the mortgage. It is urged in argument, that Toby ought to have caused an inscription of the mortgage to be made in his name, in order to entitle him to its advantages and benefits.

The transferee of a mortgage, standing in the name of the original mortgage creditor, may exercise his right of mortgage, on making proof of the transfer, without having the mortgage enregistered in his own name.

We are of opinion the Parish Court did not err in the conclusion to which it came. We consider it perfectly legal, that when a mortgage stands enregistered in the name of the original creditor, any person on making proof of his having

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February, 1836. premises, may exercise such rights.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

BERARD, f. w. c. vs. BERARD ET AL. f. p. c.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A slave cannot stand in judgment for any other purpose than to assert his freedom. He is not even allowed to contest the title of the person claiming him as a slave.

This is an action in which the plaintiff claims her freedom and that of her children. She alleges she was born free, in the Island of St. Domingo, which place she left under the care of Marie Jeane Berard, her aunt, and came to New-Orleans, with whom and Marie Louise Berard, her sister, she lived for a long time, and until the death of the former, in 1814. She alleges she took care of Marie Jeane until she died, and gave both sisters (her aunts) her services as one of the family. That after the decease of Marie Jeane, she continued, from affection and kind treatment; to live with her surviving aunt, the present defendant, and placed herself under her protection, and contributed by her labor to the support of them all. She alleges that the defendant, Marie Louise, has conceived the idea of making her and her five children slaves; wherefore, she prays that she and her children be decreed their freedom, and damages for their detention in slavery.

The defendant, Marie Louise, avers she never claimed the plaintiffs as slaves, but that they were the property and slaves of her deceased sister, Marie Jeane, and have descended to her

natural children and legal heirs, Celina and Antoine Garidel, who are the true and lawful owners of the plaintiffs. She prays to be dismissed, with her costs. EASTERN DIST.
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C. and A. Garidel, f. p. c. intervened and claimed the plaintiffs as their slaves, in right of their deceased mother, Marie Jeane Berard.

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The plaintiff pleaded a general denial to the petition of intervention ; denied the plaintiffs capacity to sue, being minors, and avers that the intervention is illegal, and should be dismissed.

Upon these issues and pleadings, the parties went to trial.

In the progress of the case, the plaintiffs requested the court to charge the jury, that the intervenors were bound to prove the allegation in their petition, which the judge presiding refused, and a bill of exceptions was taken.

The judge charged that it was incumbent on the plaintiffs to prove that they were entitled to their freedom, and if they failed to do so, they could not recover.

On hearing all the testimony, the jury returned a verdict in favor of the intervenors, and that the plaintiffs were slaves. From judgment rendered on this verdict, the plaintiffs appealed.

Buchanan, for plaintiffs.

1. The intervening parties were bound to make proof of their claim to the services of plaintiff and her children. The *onus probandi* lay upon them, they having alleged a claim. The court below erred in its charge. See *Code of Practice*, art. 392 and 394.

2. Parol evidence was improperly admitted to establish a title to slaves.

Denis, contra.

Martin, J., delivered the opinion of the court.

The plaintiff is a person of color, and sues her aunt, Marie Louise Berard, for the purpose of establishing her and her children's claim to their freedom. The defendant disavowed

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any title to the plaintiff, but averred she belonged to her late sister, Maria Jeane Berard, and that she descended to her sister's natural children and legal heirs, Celina and Antoine Garidel. These heirs intervened and claimed the plaintiff and her children as their property, in right of their deceased mother.

The cause was tried by a jury, who found a verdict for the intervening party, and from judgment rendered thereon, the plaintiff appealed.

During the progress of the trial, the court instructed the jury that the intervenors were not bound to show their title. The plaintiff's counsel took a bill of exceptions to the opinion of the court.

On a full consideration of the case, this court is of opinion that the instruction given to the jury by the District Judge, was correct. A slave cannot stand in judgment for any other purpose than to assert his freedom. He is not even allowed to contest the title of the person holding or claiming him as a slave.

A slave cannot stand in judgment for any other purpose than to assert his freedom. He is not even allowed to contest the title of the person claiming him as a slave.

On the merits, it was urged that the evidence of freedom resulted from the treatment of the plaintiff by the defendant, for a series of years, as a free person of color, and from which fact it was contended, she was considered free and a relation of the defendant, living in the family of the latter as a companion of the intervening parties, as their cousin, and not as their slave.

The jury, on hearing all the evidence adduced on the trial, came to the conclusion that the plaintiff failed to establish her freedom, and returned a verdict in favor of the claim of the intervenors. The district judge who tried the case, approved of the verdict; and this court cannot perceive any reason sufficient to authorise an interference therewith.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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BAKER vs. STEWART.

BAKER
vs.
STEWART.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the answer of the defendant admits the debt claimed, but avers it was contracted while he was in partnership with another person, and there is no proof of the partnership, the plaintiff will recover as on a confession of the debt.

The plaintiff, as surviving partner in the community existing between her and her late husband, and as natural tutrix of her minor child, sues to recover the balance of an account of three hundred and thirty-seven dollars due the community.

The defendant avers, that at the time of the purchase of the articles in the account, he was in partnership with another person, who should have been sued jointly with him. He denies the plaintiff's right to recover in the capacity in which she has instituted suit, or against him alone, and prays to be dismissed with his costs.

The plaintiff proved her capacity and right to sue, and upon this evidence and the confession of the debt in the answer, judgment was rendered against the defendant in her favor for the sum claimed. The defendant appealed.

Benjamin, for the plaintiff.

Roselius, for the appellant.

Mathews, J., delivered the opinion of the court.

This suit is brought by a widow, holding property in community with the succession of her deceased husband, and as tutrix of her minor child.

The answer does not deny the debt, but alleges that it was contracted by the defendant whilst he was in partnership with another person, &c. The right of the plaintiff to sue in

EASTERN DIST. the capacities assumed, is also denied. There was judgment
February, 1856. for her in the court below, from which the defendant appealed.

RIKER
vs.
HIS CREDITORS.

Where the answer of the defendant admits the debt claimed, but avers it was contracted while he was in partnership with another person, and there is no proof of the partnership, the plaintiff will recover as on a confession of the debt.

The record contains proof of the right of the plaintiff to maintain the action, according to the allegations of her petition; and the answer was considered as a confession of the debt, in which we think there is no error. No evidence appears to have been adduced to prove the partnership alleged, and if there had been proof of this fact, it probably would not have altered the correctness of the conclusion of the court below; for if they were commercial partners, they were bound *in solido*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.



RIKER vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An appeal from an order sustaining the opposition of the attorney of absent creditors, to the fairness and honesty of the surrender of his property by the insolvent, on a charge of fraud, will be dismissed as a case not appealable.

In May, 1835, the plaintiff made a surrender of his property for the benefit of his creditors. In June following, Vance and others filed an opposition, charging him with fraud in ceding his property, and praying that he be deprived of the benefit of the insolvent laws. The attorney for the absent heirs, joined in the above opposition. Afterwards, the attorney for the creditors in the first instance, had leave to discontinue their opposition. But it was ordered to stand as regards the absent creditors. From this last order, the insolvent appealed.

Potts, for the appellant.

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Jackson, for the absent creditors.

SUMMERS
vs.
BAUMGARD.

Mathews, J., delivered the opinion of the court.

This is an appeal from an order of the court below, by which an opposition of absent creditors, made by their attorney, to the fairness and honesty of the surrender of his property by the insolvent on a charge of fraud, was sustained for the purpose of being legally investigated.

An appeal from an order sustaining the opposition of the attorney of absent creditors, to the fairness and honesty of the surrender of his property by the insolvent, on a charge of fraud, will be dismissed, as a case not appealable.

This order is certainly a mere interlocutory judgment, which causes no irreparable injury to the appellant. If there be error in it, this court may correct it on an appeal from any final judgment which may be rendered in the cause.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, at the costs of the appellant.

SUMMERS vs. BAUMGARD.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a case of wanton and illegal arrest of plaintiff's horse and dray, and illegal detention of them without cause by the defendant, it evinces such an obstinate determination to take justice into his own hands, as will authorise a jury to inflict damages in the shape of smart money.

This is an action to recover a horse and dray, and four boxes and a basket of porter and ale, which the plaintiff alleges the defendant illegally and wrongfully took from him, and refuses to deliver up, although amicably requested. He prays judgment for the delivery of said property, and one thousand dollars in damages, for the illegal detention thereof.

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SUMMERS
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The defendant denied the illegal taking and detention of the property claimed in the petition ; but avers he found it in possession of a runaway apprentice, and arrested him and took the property into his possession, as he had a right to do. That he was ignorant whose property it was, and that no amicable demand was made of any damages, as alleged in the petition. He further avers, that he is entitled to five hundred dollars from the plaintiff for harboring and employing his indented apprentice, by reason of which he lost his services as an apprentice to the baking business, and many of his customers ; he being a baker and bread merchant. He claims this sum in reconvention.

Upon these pleadings, the cause was submitted to a jury, who after hearing the evidence adduced by the parties, returned a verdict for the plaintiff, of three hundred dollars in damages, and that the dray, harness, and boxes of porter and ale be delivered up. From judgment rendered thereon, the plaintiff appealed.

Roselius and M'Millen, for the plaintiff.

M'Kinney, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff, who alleges himself to be a porter, ale and beer merchant, instituted the present suit to recover of the defendant, damages for the illegal arrest of his horse and dray, with sundry boxes and a basket containing a quantity of porter and ale, and for the wrongful detention of the same, and the consequent loss of custom and customers in his trade. The defendant attempted to justify the taking, by the fact that the horse and dray were found in possession of his runaway apprentice, and he demands damages in reconvention against the plaintiff for harboring him, and for the consequent loss of his custom as a baker and bread merchant. He alleges, at the same time, that when he arrested his apprentice, he did not know to whom the horse and dray belonged.

The issue thus made up, was submitted to a jury, who awarded three hundred dollars to the plaintiff, and the defendant appealed.

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MISSISSIPPI MARINE AND FIRE
INS. CO.

The parties have not thought proper to furnish us with any arguments on either side, and after a careful examination of the evidence, we are quite at a loss to conceive on what the appellant could have founded any hope of relief from this court. The necessity of seizing the horse and dray in the first instance, in order to get possession of his truant apprentice boy, is not very obvious; but the detention of them after repeated demands, and the offer on the part of the plaintiff to give him ample security to make good any damage for which he might be justly liable, evince such an obstinate determination on the part of the defendant to take justice into his own hands, as fully authorised the jury to make him pay something in the shape of smart money. There is not a tittle of evidence in support of the pretended claim of the defendant against the plaintiff in reconvention. Among the items in the account which he insisted should be paid before he would give up the property, is one of five dollars as a reward for taking up his own apprentice; and another of fifteen dollars for serving his customers.

In a case of wanton and illegal arrest of plaintiff's horse and dray, and illegal detention of them, without cause, by the defendant, it evinces such an obstinate determination to take justice into his own hands, as will authorise a jury to inflict damages in the shape of smart money.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

CURELL ET AL. vs. MISSISSIPPI MARINE AND FIRE
INSURANCE COMPANY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An error in stating the *time* when a vessel sailed, so as to place her *out of time*, when the insurance is effected, will be considered a misrepresentation and concealment of the true time, whether through error or intention, sufficient to avoid the policy and release the insurers.

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A knowledge of the true date at which a ship sails, is all important to the insurers, who are about to take upon themselves the risk of her safe arrival at the port of destination.

The plaintiffs commenced this action on a policy of insurance, effected in the office of the defendants, the 4th of January, 1831, but the policy was not delivered until eight days afterwards. The defendants insured the risks "on supposed commissions on goods to the consignment of the insured on the ship *Edward Downs*, from Belfast to New-Orleans, conditioned that the said company should be liable only for total loss, on the non-arrival of said ship in the port of New-Orleans." The ship was lost and the plaintiffs claim two thousand seven hundred dollars as the amount of their commissions also lost.

This case has been before the court and remanded for another trial. See *facts and evidence of the case stated in 3 Louisiana Reports, 353.*

On the return of the cause it was submitted to the district judge, on some additional testimony taken on the second trial. The only remaining points to be decided relate to misrepresentation and concealment on the part of the insured.

One of the plaintiffs, who applied for the insurance, stated to the secretary of the company that the ship had been at sea about seventy-two days; that she had sailed between the 18th and 25th of October, but not before the 18th. Another of the plaintiffs (*Kilshaw*) distinctly stated that he had letters from Belfast to the 18th of October, at which period the ship *Edward Downs* had not sailed. These were the representations made by the party effecting the insurance, and at the time of taking out the policy. It was further stated that the vessel was seen off the coast of Jamaica, the 1st of December.

The evidence established that the vessel actually sailed the 6th of October, and at the time of effecting the insurance was out ninety instead of seventy-two days, as represented.

T. Urquhart, witness for the defendants, being asked, "if from his experience as a merchant or underwriter, he would not consider the fact of a vessel having sailed from a foreign port fourteen days earlier than was represented at the time of

effecting insurance on her, *as a material fact in influencing the insurers in taking the risk*, says, he should undoubtedly consider such misrepresentation to be a material fact in effecting such insurance.”

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Being asked, whether, if in considering the time of a vessel sailing as material, he would not add such a clause as a warranty, and insert the same in the policy, says, that if he considered the time of sailing as material, he would insert the same in the policy.”

Witness considers the premium of seven and a half per cent. for insurance on commissions as a high rate, and out of the ordinary rate of insurance. The usual rates on goods from Europe to the port of New-Orleans, on vessels out forty or fifty days, is one and a half per cent.

Witness being cross-examined, was asked if he would consider the fact of a vessel bound to New-Orleans, having sailed the 6th of October, instead of the 18th, as represented to the insurers, as a material fact, if the vessel insured had been seen off the Island of Jamaica on the 1st of December, when the insurance was made in New-Orleans the 4th of January following ; says, in that case he should not consider the fact of the vessel having sailed fourteen days earlier than was represented, *to be material*. But that from the constant and almost daily intelligence received in this country from Europe, it is impossible to conceal the actual date of a vessel sailing from thence. That the precise time of vessels sailing from a *port* in Europe to this place is generally uncertain, and not positively known to merchants here.” But further, in the opinion of witness, “if a person applying for insurance on a vessel, in place of stating in the usual way that the vessel was to sail on or about a certain day, stated to the underwriters that letters received from the port from which the vessel was to sail, and that she had sailed between the 18th and 25th of a certain month, and not before the 18th, and the fact turns out that she actually sailed on the 6th of the same month, such a misrepresentation would *be very material*. Witness has been a director or president of an insurance

EASTERN DIST. company ever since their first establishment in the city of
 February, 1856. New-Orleans.”

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 INE AND FIRE
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It was in evidence that the Edward Downs was seen off the coast of Jamaica the 1st of December, by the ship Mars, but this fact was not communicated at the time of making the insurance, though it was known and reported to the office before the policy was delivered to the insured. It was also in evidence that passages from Europe to New-Orleans were unusually long that season. The Edward Downs was lost on the 3d of December.

From all the evidence exhibited, the district judge concluded that the ship was out of time when the insurance was effected. Judgment was rendered for the defendants. The plaintiffs appealed.

Eustis, for the plaintiffs, contended,

1. That there could not at the present state of regular communication between this country and Great Britain and Ireland, be any thing like a deception as to the time of sailing of a general ship, a regular trader, from a port like Belfast to New-Orleans.

2. Any verbal representation on the subject, must be a matter of conjecture, as the newspapers afford to every Insurance office, certain *means of information*, as to the time of the sailing of vessels, those in port, &c. &c. Courts so interpret all representations of this kind. *Phillips on Insurance*, page 82. The former ones *on this subject*, are no longer adhered to, and a rule is adopted more consistent with the intelligence of the age. A case is there cited, in which a ship represented to sail in May, sailed in July. It was held not to be a misrepresentation. *Allegra & Adams vs. The Maryland Insurance Co.* 1 *Gill & Johnson*, 136.

3. Underwriters are presumed to know the ordinary marine intelligence. 2 *Phillips on Insurance*, 85. “The general presumption is, that the agents of the office will examine those items of marine intelligence which are expressly designed speedily to diffuse information.” 10 *Pickering's Reports*,

402. 2 *Phillips*, 85-6-7. *Manuscript case of Alsop vs. The Commercial Insurance Company*, decided by Judge Story, in EASTERN DIST. February, 1836. October, 1833.

4. If the underwriters were misled in this case, it was because they choosed to be. The possession of the ordinary marine intelligence, which they were bound to know, would have prevented any mistake on the subject.

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5. If the representation was important, it ought to have been inserted as matter of warranty. See *testimony of Urquhart*. 1 *Phillips*, 130, *et seq.* The delivery of the policy to the assured, after the situation of the vessel was known to the insurers, without any mention or warranty as to the time of sailing, was a waiver by the insurers of any representation on that point.

Lockett, for the defendants.

G. B. Duncan, contra.

Mathews, J., delivered the opinion of the court.

This case was before the Supreme Court in *February term*, 1832, and was remanded to the District Court for a new trial, in consequence of a belief that the verdict of the jury, on which the judgment had been based, was not supported by the evidence. The cause on the new trial, was finally submitted to the decision of the court, without the intervention of a jury, and judgment being rendered for the defendants, the plaintiffs appealed.

A correct decision of the case depends mainly on one fact, viz. whether there was concealment or misrepresentation on the part of the insured relative to the time at which the vessel sailed from the port *a qua*. The plaintiffs having insured the amount of commissions to which they would be entitled on goods shipped to their consignment, by the ship *Edward Downs*, from Belfast, in Ireland, to New-Orleans. All the important facts disclosed by the testimony, are detailed in the opinion heretofore pronounced by this court. See 3 *Louisiana Reports*, 353.

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In the evidence then offered, allusion was made to letters which had been received by the plaintiff, Kilshaw, from Belfast, from which it was presumed he had derived knowledge of the true date on which the ship sailed.

These letters were not shown on the first trial of the cause in the court below, but were exhibited on the last. They do not, however, in our opinion, materially vary the state of the case. If they be admitted to have any effect on it, the conclusion or influence to be drawn from them, would be rather prejudicial to the pretensions of the appellants. In obtaining the insurance, the plaintiffs assumed as a fact, and so represented it to the insurers, that the vessel did not sail before the 18th of October, 1830. Now by one of the letters alluded to, dated Belfast 13th October, and received in New-Orleans on the 22d of December following (about twenty days before the insurance was effected) mention is made of goods similar to those per Edward Downs, as being on hand. The inference from this expression (as we understand it) would be that the ship had sailed before the date of this letter.

The only question in the case is, whether the information or representation given by the insured to the insurers at the time of making the contract, and which is shown by the evidence to have been incorrect, was of a fact material to the risk assumed.

We state this as the only question, because considering the obligation of the insurers complete and binding from the time the terms of insurance were accepted by them, (if the contract be one entered into in good faith and without error,) in considering the case, we leave entirely out of view the subsequent occurrences disclosed by the testimony, as to the observations of the president of the company about the time the policy was delivered to the plaintiffs, and after some additional facts relative to the progress of the ship on her voyage, had come to the knowledge of the insurers. These facts can have no influence on the cause, for it was not known at the time of making the contract, that the vessel had been seen near the coast of the island of Jamaica. The insurance

must be considered as one from Belfast to New-Orleans. The representation made by the plaintiffs at the time when it was obtained, showed the ship to be out from the port *a quo* seventy-two days, when in truth ninety days had elapsed from the period of her sailing, making a misrepresentation or suppression of the space of eighteen days. Whether this misstatement arose from a deliberate intention to deceive, or from error, is not material, the fact being assumed on the part of the applicants for insurance; if it be material in relation to the risk taken, and was afterwards shown to be false, it suffices to avoid the contract.

The testimony shows, that an ordinary voyage from Belfast to New-Orleans, is performed in about fifty or fifty-five days. But when western winds prevail, the period may be lengthened.

From this it is seen that the ship, in the present instance, was greatly out of time when the insurance was effected. The knowledge, therefore, of the true date at which she left the port *a quo*, (as it appears to us) was all important to those who were about to take on themselves the risk of her safe arrival in the port of destination; and they cannot be presumed to have been conusant of this fact, as they were not directly interested in such knowledge previous to the time when the erroneous representation was made to them by the plaintiffs.

It is seen that we have considered the case solely in relation to the doctrine of representations in insurance, and as not coming within any of the rules relating to warranties, and as a proof of the correctness of this mode of treating it, we refer to *Condy's Marshal*, page 450, *et seq.* and *Phillips on Insurance*, pages 85-6.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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CURELL ET AL.
VS.
MISSISSIPPI NA-
VINE AND FIRE
INS. CO.

An error in stating the *time* when a vessel sailed, so as to place her *out of time*, when the insurance is effected, will be considered a misrepresentation and concealment of the true time, whether through error or intention, sufficient to avoid the policy and release the insurers.

A knowledge of the true date at which a ship sails, is all important to the insurers, who are about to take upon themselves the risk of her safe arrival at the port of destination.

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M'MANUS'S
SYNDIC
vs.
JEWETT.

M'MANUS'S SYNDIC vs. JEWETT.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

In an action by the syndic of creditors to annul certain sales made by the absconding debtor, on the ground of fraud, it is not sufficient that the insolvent debtor and a person acting as the common friend of both parties, were guilty of fraud and simulation, to enable the plaintiffs to succeed, if it appears the purchaser acted fairly and honestly.

This is an action instituted by the syndic of the creditors of Francis M'Manus to annul the sales of certain property made by the insolvent, M'Manus, to the defendant, on the eve of his absconding and leaving the state, on the ground of fraud and simulation.

This case was before the court in 1834. See the facts and evidence fully stated in the former report of the case. 3 *Louisiana Reports*, 530.

On the return of the cause to the Parish Court it was submitted to a jury, who after hearing much testimony touching the pecuniary affairs of the insolvent at the time of executing the sales of his property in question, and receiving an elaborate and minute charge from the judge presiding, delivered a verdict for the plaintiff on the ground that the sales were simulated and made in fraud of creditors. Upon judgment rendered in conformity to the verdict, the defendant appealed.

Preston, for the plaintiff.

Hoffman and *Strawbridge*, for the appellant.

Mathews, J., delivered the opinion of the court.

Most of the legal questions involved in this case have already been settled by our former decision in it, which may be seen in the 6th volume of *Louisiana Reports*, page 530.

What remained to be decided when the cause was remanded, relates principally to matters of fact out of which arise questions of fraud and simulation; they were submitted to a jury who found a verdict for the plaintiff, and judgment being thereon rendered the defendant appealed.

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In matters of this kind it is generally admitted and has been often asserted by this court that juries are proper judges, and in all cases where their verdicts have been supported even by evidence, doubtful, in our view, we have refrained from interfering with their conclusions based on the facts of a case. But this court is so constituted as to require of its judges to inquire into and decide on questions of fact as well as those of law, and when, from an attentive examination of the testimony in a cause, we believe a verdict to have been found entirely contrary to the truth of the facts of a case, or without any evidence to support it, in such a case it has been our uniform course of proceeding to send the cause back to the inferior court to be tried *de novo*, and again submitted to another jury if the parties require it.

The application for a new trial in the court below on the ground of newly discovered evidence (and which has been so strongly urged on this court) is perhaps not supported by the circumstances of the cause, but on this subject we give no decisive opinion, believing that it ought to be remanded on other grounds.

We have carefully and attentively examined the testimony, and have been unable to discover any facts disclosed by it calculated to sustain the verdict of the jury, according to the legal principles of the case, as heretofore established by this court. There are none which, pursuant to our view of it, prove fraud on the part of the defendant, in the purchase of property from M'Manus, who soon after acted the part of a fraudulent insolvent. Whatever may have been his misconduct, or that of Prendergast, the common acquaintance of him and Jewett, it ought not to be visited as an offence on the latter, who for any thing shown to the contrary in the present state of the testimony, appears to us to have acted fairly and honestly.

In an action by the syndic of creditors to annul certain sales made by the absconding debtor, on the ground of fraud, it is not sufficient that the insolvent debtor and a person acting as the common friend of both parties, were guilty of fraud and simulation, to enable the plaintiff to succeed, if it appears the purchaser acted fairly and honestly.

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NOIRETTE,
f. w. c.
vs.
DIGGS'S HEIRS.

It is, therefore, ordered, adjudged and decreed that the judgment of the Parish Court be reversed and annulled; the verdict of the jury set aside, and that the cause be sent back to the court below for a new trial, and that the appellee pay the costs of this appeal.

NOIRETTE, f. w. c. vs. DIGGS'S HEIRS.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

An assumpsit by a deceased vendor, to refund the price of a slave which died of a redhibitory disease, is binding on his heirs.

Ten per cent. damages will not be awarded in an appeal case, which in its origin was one of litigation and uncertainty.

This is a redhibitory action. The plaintiff alleges she purchased a negress slave of a certain C. W. Diggs, who soon after died of scrofula, which disease existed before and at the time of sale. She claims a rescission of the sale with a return of the price, (four hundred and twenty-five dollars,) from the heirs and legal representatives of said C. W. Diggs, now deceased, who in his lifetime admitted the justice of her claim.

James B. Diggs, heir and attorney in fact of the other heirs of C. W. Diggs, deceased, admitted the sale, and pleaded the general denial to all other matters alleged in the petition, and further pleaded prescription.

On the trial the plaintiff proved by one witness that the deceased started from New-Orleans soon after the sale, which was made the 23d of November, 1831. The slave died in three or four months afterwards. The deceased promised to pay, and the defendant, J. B. Diggs, acting for himself and

the other heirs renewed the promise after receiving certificates from three physicians. EASTERN DIST.
February, 1836.

Upon this assumpsit the judge of probates gave judgment in favor of the plaintiff, for the price claimed, with interest thereon from the day of sale. The defendants appealed.

NOIRETTE,
f. w. c.
vs.
DIGGS'S HEIRS.

Soulé, for the plaintiff.

Strawbridge, contra.

Mathews, J., delivered the opinion of the court.

This is a redhibitory action in which the plaintiff claims restitution of the price of a female slave, sold to her by Christopher W. Diggs in his lifetime, who is represented by the defendants as his heirs; prescription is pleaded by them to the suit and a general denial of all the allegations in the petition except their heirship. Judgment was rendered for the plaintiff in the court below, from which the defendants appealed.

The petition alleges the absence of the vendor from the state as an interruption of the prescription relied on by the defendants, and also an assumpsit on his part to refund the price of the slave on being informed that she had died shortly after the sale, of a hereditary and incurable disease. The record contains no evidence of the absence of the vendor, but there is proof of his having assumed to return the price, as declared in the petition. On this evidence, the court below seems to have based its judgment, and in our opinion acted correctly. There is a prayer in the answer to the appeal for ten per cent. damages; but it is believed that this is a case in which damages ought not to be decreed, because in its origin it was one of litigation and uncertainty.

An assumpsit by a deceased vendor, to refund the price of a slave which died of a redhibitory disease, is binding on his heirs.

Ten per cent. damages will not be awarded in an appeal case, which in its origin was one of litigation and uncertainty.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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MORTON
vs.
POLLARD.

MORTON vs. POLLARD.

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APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

In an action on a special agreement, for the *price* of putting up a mill, evidence of the *value* of the work and labor done on it, will not be admitted; the parties having agreed on the price.

There is no law requiring a party claiming damages, for an injury resulting from the non-performance, or unskilful performance of a contract for work and labor to be done, to first put the delinquent party *in morâ*.

This is an action on a written contract, entered into between the plaintiff and defendant, in which the former agreed to build a mill for the latter, who was to pay him six hundred and seventy-five dollars, as the price therefor. He alleges he has performed the contract, and claims the sum agreed upon as now due, which the defendant refuses to pay.

The defendant admitted the written agreement sued on, but avers the plaintiff failed to comply with his contract; that the work he performed towards erecting the mill, was done in an unworkmanlike manner, and so defective that she was obliged to employ other workmen to complete it and repair the defects; and that by reason of the delay and neglect of the plaintiff, she has sustained damages in the loss of her crop and expenses, to the amount of one thousand dollars; for which she prays judgment in reconvention.

Upon these issues, the parties went to trial before the court and jury. The plaintiff asked a witness what was the value of certain parts of the mill, which had been made by him under his contract. The defendant objected to the question asked of the witness, on the ground that a specific contract existed between the parties, and it was not competent to go into an inquiry of the value of parts of the work, there being no allegation of part performance, and that he was

entitled to recover as upon a *quantum meruit*. The objections were overruled by the court, and a bill of exceptions taken.

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The defendant offered evidence to prove the amount of damages sustained by the defective and bad manner in which the plaintiff had performed the work, for the reason that the defective performance of the work, formed a ground of action for a violation of the contract, and that it was not necessary to show that the plaintiff had been put *in morâ*. The evidence was objected to, and the objection sustained by the court. The defendant excepted.

MORTON
vs.
POLLARD.

The cause was submitted to a jury on the evidence produced, and a verdict was returned in favor of the plaintiff for five hundred and twenty-five dollars. From judgment rendered thereon, the defendant appealed.

The case was argued *ex parte*, by *Mr. Labauve*, for the defendant and appellant.

Martin, J., delivered the opinion of the court.

This is an action to recover from the defendant the sum of six hundred and seventy-five dollars as the price of work and labor done in building a mill for the latter, in pursuance of a written agreement between the parties.

The defendant resists payment on an allegation that the work done on the mill had been so defectively and unskilfully executed, that the plaintiff, so far from having complied with his contract, and benefited her by erecting and completing her mill, by his delay and bad workmanship, had caused her material injury, and was the means of losing her crop. She claimed damages in reconvention. The plaintiff had a verdict and judgment, from which the defendant appealed.

In the argument of the case, the counsel for the appellant has drawn the attention of the court to two bills of exception. The first is taken to the admission of evidence offered to prove the value of part of the work and labor done.

The second bill of exception, is taken to the refusal of the judge to receive evidence, offered to support the claim and plea in reconvention.

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LANUSSE.

In an action on a special agreement, for the price of putting up a mill, evidence of the value of the work and labor done on it, will not be admitted, the parties having agreed on the price.

There is no law requiring a party, claiming damages for an injury resulting from the non-performance, or unskillful performance of a contract for work and labor to be done, to first put the delinquent party *in mori*.

We are of opinion the district judge erred, in excluding the evidence, in both instances. The parties having agreed on the price to be paid for the work and labor in putting up the mill, evidence of the value of the work done, is inadmissible.

The court declared it as its opinion, that the violation of the contract for which damages were sought in reconvention, was passive and not active, and that it should be first shown that the plaintiff had been put *in mori* for the non-performance of his contract, before the defendant in reconvention could recover damages.

This court is unacquainted with any rule of law, which requires the party claiming damages for an injury sustained on account of the non-performance or defective performance of a contract for work and labor to be done, to first put his adversary *in mori*, before he can be permitted to prove his damages.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside and the case remanded for a new trial, with directions to the judge not to allow evidence of the value of the work on a *quantum meruit*; nor to reject evidence in support of the plea in reconvention; and that the plaintiff and appellee, pays costs in this court.

DEVERGES vs. LANUSSE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a mortgage is regularly recorded, before sale and conveyance of the property in dispute to the defendant who is third possessor, and before the latter became a creditor of the mortgagor, ought he to be allowed to impeach the validity of the contract of mortgage as against the mortgagee:
Quere?

Where the consideration of a contract of mortgage is impeached by the third possessor of the mortgaged premises, *prima facie* evidence of the genuineness inherent in the contract itself, coupled with proof of advances in money, &c. to the mortgagor by the mortgagee, will authorise a recovery against the third possessor.

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DEVERGES
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LANUSSE.

This is a hypothecary action against the third possessor of mortgaged property. The plaintiff claims the amount of a promissory note for nine thousand three hundred dollars, executed by his son to him for advances of money, and secured by a mortgage on certain property in the city of New-Orleans. Since the execution of the note and mortgage, Deverges, the son and mortgagor, sold the mortgaged premises to the defendant, Lanusse. The plaintiff prays for an order of seizure and sale of the property in contest.

The defendant resisted the order of seizure, and also the plaintiff's hypothecary action, on several grounds: *First*, that the plaintiff never advanced the money to his son for which the note purports to have been given; that the act of mortgage is simulated and the note given without consideration.

2. That by the declarations of father and son, the note in question was cancelled.

3. That certain slaves given in the same act to secure this pretended debt, are in the plaintiff's possession or have been sold for his benefit, and he is required to account therefor.

4. That when he purchased the property in dispute the son of the plaintiff declared in the act there was no note due by him to his father, but that it was extinguished.

He prays that P. Deverges, the son and mortgagor, be cited, and if he fails in his opposition, that he may have judgment against said mortgagor for eight thousand dollars loss and damage.

Upon these pleadings the parties went to trial. Much testimony was taken and produced on both sides, which is stated in the opinion of the court.

The district judge in trying the case, remarked that it contained conflicting equities which could only be correctly settled by a close attention to the relation of the parties and a minute detail of facts. He finally decreed a sale of the

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property to pay the plaintiff's claim, after allowing the costs of this suit and a sum of dollars to the defendant, and the remainder, if any, be paid to the defendant. The latter appealed.

Canon, for the plaintiff.

Peirce, contra.

Mathews, J., delivered the opinion of the court.

This is an hypothecary action in which the plaintiff prayed for an order of seizure and sale of a house and lot (as described in his petition) which was at the time held by the defendant as a third possessor who makes opposition to the seizure, alleging that the mortgage under which it is claimed is simulated and that no consideration was given by the mortgagee for the promissory note of the mortgagor, to secure the payment of which the contract of hypothecation was made. On this opposition, the plaintiff proceeded to prove the reality and genuineness of the contract, and thus to justify its fairness and honesty.

The court below, after hearing much testimony, supported by its judgment the order of seizure and sale, from which the defendant appealed.

The mortgage purports to secure the payment of nine thousand three hundred dollars, the amount of a note given by the mortgagor to the plaintiff at the time of entering into the contract, and also to secure the latter for endorsements, which he might make subsequently for the use and benefit of the former.

This was a transaction between a father and his son, who at the time was about to commence some mercantile pursuit, and appears to have been intended to aid him in his undertaking. No specific amount of endorsements is stipulated in the contract of hypothecation, nor is any thing claimed on that ground in the present suit, although evidence of endorsements to a considerable sum appears in the record. This part of the cause need not, however, be commented on, as

we are of opinion with the court below, that the plaintiff has made out his case as it relates to the promissory note given by his son at the period when the contract of mortgage was entered into.

This mortgage was regularly recorded long before the mortgagor conveyed the property in dispute to the defendant, and before he became a creditor of the former. Under these circumstances, a question might be raised whether the appellant ought to be allowed to impeach the validity of a contract in which he was not at the time of its confection interested, either directly or indirectly, and of the existence of which he must be supposed to have had knowledge, as it was made in public and authentic form, and had been duly registered in the office of recorder of mortgages. But it is unnecessary to touch this question, believing as we do that the testimony of the case establishes the reality and truth of the agreement in relation to the note which it purports to secure.

It is proven on the part of the plaintiff that five thousand dollars had been borrowed from the Merchants' Insurance Company, in the month of March, 1831, in the name and on the credit of Deverges, the father, which sum was received by the son. The note which was given by the plaintiff is still due by him and he has paid the interest on the capital. This was done three months before the date of the note and contract of hypothecation now in question, which has never been regularly cancelled. There is also evidence on the record of three thousand dollars more having been advanced by the father to his son. If, to the force of this testimony, be added the *prima facie* evidence of genuineness inherent in the contract itself, and if we further take into consideration the fact shown by the record, that the plaintiff will probably suffer large losses by the mismanagement of his son in conducting his business, it would seem that principles both of law and equity clearly support the judgment of the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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DEVERGES
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Where a mortgage is regularly recorded, before sale and conveyance of the property in dispute to the defendant, who is third possessor, and before the latter became a creditor of the mortgagor, ought not to be allowed to impeach the validity of the contract of mortgage, as against the mortgagee: *Quære?*

Where the consideration of a contract of mortgage is impeached, by the third possessor of the mortgaged premises, *prima facie* evidence of the genuineness inherent in the contract itself, coupled with proof of advances in money, &c., to the mortgagor, by the mortgagee, will authorise a recovery against the third possessor.

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BERTHOUD'S
HEIRS
vs.
UNRUH.

BERTHOUD'S HEIRS vs. UNRUH.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The heirs of a succession, the property of which is sold at a judicial or probate sale, are not bound to execute a notarial act of sale to the purchaser.

But persons who provoke a sale, are bound to see that its terms are correctly announced. If the terms announced are different from what the law requires, the sellers are still bound to comply with them, or the bidder is released from his bid.

A notarial act of sale, is neither necessary or essential to the purchaser at a judicial sale. The adjudication made and recorded in court, is a complete title to the purchaser. A notarial act may, nevertheless, be useful.

The defendant, Unruh, became the purchaser of a slave at the sale of the succession of Mrs. Berthoud. The sale was made by the register of wills, and by order of the Court of Probates. At the foot of the advertisement, the register says, "the acts of sale will be passed before William Christy, notary public, at the expense of the purchaser." The purchaser refused to comply with his bid, until the act of sale was executed.

The plaintiffs took a rule on the defendant, to show cause why he should not comply with the terms of sale, or the property would be sold again at his expense. He replied he was always ready to comply whenever the notarial act was passed, but that the plaintiffs had refused; wherefore, he prays, that the adjudication to him be annulled, and the rule discharged. The rule was discharged accordingly. The plaintiffs appealed from the order discharging it.

Buchanan, for the plaintiffs.

Roselius, contra.

Martin, J., delivered the opinion of the court.

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The surviving husband and heirs of the late Angella Berthoud, have appealed from the decision of the Court of Probates for the parish and city of New Orleans, discharging a rule which they took on one John Unruh, the purchaser of a slave at the sale of the succession of Mrs. Berthoud, to show cause why he should not comply with the terms of the adjudication to him, or in default thereof, that the property be advertised and resold at his cost.

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Unruh alleges in his defence, that he had been induced to bid at the sale, under the belief that a notarial act of sale would be given by the register of wills, according to his advertisement publishing the terms of sale. That he has always been ready and willing, on his part, to comply with the terms of the adjudication, and applied at the office of the notary named for the purpose of passing the act, but that the plaintiffs in the rule, have always refused to pass said deed.

The heirs of a succession, the property of which is sold at a judicial or probate sale, are not bound to execute a notarial act of sale to the purchaser.

On the part of the plaintiffs in the rule, and appellants in this court, it is strenuously urged that such an act as the one demanded by the purchaser is not required by law ; that the Louisiana Code, article 2601, declares that a notarial act is unnecessary to complete the title of a purchaser at a judicial sale, and that in fact the register of wills was without authority to bind them to do any thing which is not required by law.

But persons who provoke a sale, are bound to see that its terms are correctly announced. If the terms announced, are different from what the law requires, the sellers are still bound to comply with them, or the bidder is released from his bid.

It is clear, in the opinion of the court, the register had no such power or authority, and the heirs of the estate, who are appellants here, are not bound to execute a notarial act, such as the one in question ; but it appears equally clear, that those who provoke a sale are bound to see that the terms of it are correctly announced, and that they cannot compel persons who bid at the sale to comply with different conditions, or carry their bid into execution on any other terms than those published before the sale took place.

A notarial act of sale is neither necessary or essential to the purchaser at a judicial sale. The adjudication made and recorded in court, is a complete title to the purchaser. A notarial act may nevertheless be useful.

An act of sale passed by a notary is, indeed, neither necessary or essential to the perfection of the title of the purchaser, but it may, nevertheless, be useful. The fact that notarial titles were promised in the advertisement which

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preceded the sale, entitles the bidder to demand them on the adjudication, and justifies him in declining a compliance with the terms of sale, if they are withheld or refused.

The circumstance that the notarial act promised to purchasers, was stated in the postscript, instead of the body of the advertisement, does not alter the case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Probate Court be affirmed, with costs.



GARNIER ET AL vs. PEYCHAUD'S SUCCESSION.

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
 NEW-ORLEANS.**

An inscription of a mortgage made the day before the death of the debtor, by one of the creditors, will have effect against all the others, although the succession proves to be insolvent and insufficient to pay all the creditors at the time it is opened.

An erased credit on a note in the possession of the creditor, is not conclusive proof, but may be repelled by evidence to show that it was erroneously endorsed.

A note with the signature of the debtor crossed or erased, is still admissible in evidence on the part of the creditor, to show he has paid it for the former, and is entitled to be refunded out of his estate. The erasure furnishes a presumption in favor of the debtor, but it is not a presumption *juris et de jure*. It may be entirely repelled by showing that the signature was crossed through error or inadvertency.

A note to which the deceased was no party, is *per se* inadmissible in evidence to charge his estate with its amount. But evidence to show that the proceeds of it when discounted went into his hands, is admissible.

The plaintiffs are opponents of the tableau of distribution filed by the syndic of the insolvent succession of P. M. A. Peychaud, deceased.

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SUCCESSION.

Garnier and others allege they are creditors of the estate of Peychaud to the amount of twelve thousand four hundred and seventy-five dollars, and that their claims have been placed on the tableau as ordinary debts. They allege that Hermann & Son are placed thereon as mortgaged creditors for the sum of two thousand dollars, to their prejudice, the judgment under which the mortgage is claimed not being recorded in time. That P. Guesnon is in like manner placed on the tableau as a mortgage creditor for two thousand five hundred dollars.

They also oppose the claim of Madame Peychaud for fourteen thousand dollars as an ordinary creditor, alleging that there is nothing due to her.

St. Martin and Christy also filed their joint opposition to the tableau joining in the opposition of Garnier and others, and asserting claims of their own which were omitted to be placed on the tableau.

Guesnon's judgment was recorded the 25th of February, and Peychaud died the 26th, being the next day thereafter. Hermann & Son's judgment was recorded the 20th of February. The opposition to it was given up.

Madame Peychaud's claim was contested on the trial of these oppositions. The evidence and facts relating to it are fully stated in the opinion of the court.

The judge presiding in the Court of Probates, overruled the oppositions to Hermann & Son's and Guesnon's privileged claims, and reduced the claim of Madame Peychaud to one thousand dollars. The claims of St. Martin and Christy were recognised and they placed on the tableau as ordinary creditors.

Madame Peychaud, Garnier and others, and St. Martin and Christy, appealed from the decree thus pronounced.

Grailhe, Morphy and Benjamin, for the opposing creditors.

1. Peychaud was insolvent at the time of his death, so that the recording of the judgment of Guesnon is null and of

EASTERN DIST. no effect, having been inscribed on the day previous to the *February, 1836.* decease of the insolvent debtor. *Louisiana Code, 3326.*

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2. The term *failure* is used in the above article of the Louisiana Code. It says an inscription made after the *failure, or the day preceding it*, has no effect against creditors. The term failure signifies the situation of a debtor who finds himself unable to pay his debts. *Louisiana Code, article 3522, No. 15.*

3. The inscription of Guesnon's judgment being null and void according to the provisions of the Code, he must be placed among the ordinary creditors.

4. The claim of Madame Peychaud ought to be rejected for want of sufficient proof.

Benjamin, for the opposition of St. Martin and Christy.

D. Seghers, for Madame Peychaud.

Deny, for the privileged creditors.

Bullard, J., delivered the opinion of the court.

The syndic of the estate of A. Peychaud, having filed a tableau of distribution, various oppositions were made by creditors, and the court having homologated the tableau with certain modifications, some of the opposing creditors prosecute the present appeal. We proceed to examine the several grounds of opposition, so far as they have been insisted on in this court.

An inscription of a mortgage made the day before the death of the debtor, by one of the creditors, will have effect against all the others, although the succession proves to be insolvent, and insufficient to pay all the creditors at the time it is opened.

The claim of P. Guesnon, assignee of M. Duralde, to be classed as an hypothecary creditor of the estate, is opposed on the ground that the judgment recovered against Peychaud, from which the judicial mortgage results, was not recorded in due time. That Peychaud died on the 26th February, 1834, and that the judgment was recorded on the day previous. In support of this opposition, reliance is placed on article 3326 of the Louisiana Code, which declares that an inscription made after the failure, or on the day preceding it, shall have no effect whatever against other creditors. We are of opinion that the court did not err in overruling the

opposition on this ground. The next article of the Code provides, that if a succession administered by a curator or beneficiary heir, is insufficient to satisfy the creditors, an inscription made by one of them after it is opened, shall have no effect against the others. This last article appears to us, to have provided for a case like the present, and clearly contemplates that an inscription will be valid against other creditors, if made at any time previous to the death of the debtor. It cannot be doubted, that if Peychaud had lived even another day, without making a surrender of his property, the mortgage would have attached, although it might appear afterwards, that he was in a state of insolvency. It is true this article does not speak expressly of estates administered by syndics, but the class of cases contemplated by it, in our opinion, embraces any which are insufficient to pay all the debts, and which are administered, primarily, for the benefit of creditors, whether by beneficiary heirs, administrators or syndics. *Ubi eadem est ratio, eadem est lex.* The previous article, we think, refers to a case of cession or surrender of property. It would, in most cases, be manifestly impossible to ascertain on what precise day a man had become really insolvent, when he should continue to administer his own property without either a forced or a voluntary surrender, and consequently impossible to decide what inscriptions would be valid or otherwise.

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The widow of the deceased, claimed as a creditor about fourteen thousand dollars, and her claim was reduced by the Probate Court to one thousand dollars. She insists that the court erred in refusing to allow her, 1st, the amount of a note of the deceased for one thousand eight hundred and fifty dollars; and 2d, the sum of twelve thousand dollars, the proceeds of her own note in favor of C. Mauriañ, which she alleges was discounted, and the proceeds received by her husband.

I. Upon the trial of the opposition, her counsel offered in evidence a promissory note drawn by the deceased on the 7th December, 1833, to her order, at four months, endorsed by her and H. D. Peire; at the same time offering a witness

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An erased credit on a note in the possession of the creditor, is not conclusive proof, but may be repelled by evidence, to show that it was erroneously endorsed.

A note with the signature of the debtor crossed or erased, is still admissible in evidence on the part of the creditor, to show he has paid it for the former, and is entitled to be refunded out of his estate. The erasure furnishes a presumption in favor of the debtor, but it is not a presumption *juris et de jure*. It may be entirely repelled, by showing that the signature was crossed through error or inadvertency.

A note to which the deceased was no party, is *per se* inadmissible in evidence to charge his estate with its amount. But evidence to show that the proceeds of it when discounted went into his hands, is admissible.

to prove that the note was taken up by her at its maturity, after the death of her husband. The introduction of the evidence and note was opposed, on the ground that the signature of Peychaud to the note exhibited had been crossed, and that consequently neither the note nor oral evidence in explanation of the same, could be admitted.

The court having sustained these objections, a bill of exception was taken. We are of opinion the court erred in rejecting the evidence. In the case of *Benson vs. Mathews*, we held that an erased credit on a note in the possession of the creditor, was not conclusive proof, but may be repelled by evidence to show that it was erroneously endorsed. The two cases are not strictly parallel, but the same principle applies. The erasure or crossing of the signature, furnishes a presumption in favor of the debtor, but it is not, in our opinion, a presumption *juris et de jure*. It is greatly weakened by the presumption resulting from the possession of the title itself, and may be entirely repelled by showing that the signature was crossed through error or inadvertency. Such is the doctrine taught by Pothier and by Duranton. 7 *Louisiana Reports*, 356. 13 *Duranton*, No. 432.

Under this view of the case, we should feel bound to remand the cause for a new trial, if the parties had not consented that the judgment should be reformed in this particular, and the credit allowed, if such should be the opinion of this court.

II. The widow next offered in evidence her own note in favor of Maurian, and endorsed by him and Tricou, which fell due long after the death of Peychaud, and to which he was not a party. The signature of Mrs. Peychaud had been erased from the note. She offered witnesses at the same time, to prove that the deceased had procured the note to be discounted, and that the proceeds had been delivered to him. This evidence was rejected, and a bill of exceptions taken. We are of opinion that the note *per se* was inadmissible to charge the estate. The deceased does not appear as a party, and must be considered as a stranger to the transaction. But evidence to show that the proceeds of it when discounted

went into the hands of the deceased, does not appear to us liable to the same objection. The case has been argued in this court, as if the evidence had been admitted, and the appellant cannot complain if the court now consider the fact as proved, which she offered to prove by witnesses, and proceed to adjudicate finally on the question.

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The record shows that there existed no community of property between the parties; that Peychaud was in the habit of acting as the general agent of his wife, and that this transaction took place about the 6th November, 1833, three months before the death of Peychaud. The claim filed by the widow against the estate, is a round sum of fourteen thousand dollars, without any specification of items or dates, and the amount now claimed, added to those sums already allowed her, would exceed the amount claimed originally. The record further exhibits an act of retrocession of a house and lot, previously sold by Madame Peychaud to her husband, and which contains a settlement of money transactions between them. She acknowledges that a sum of nine thousand nine hundred dollars, and a further sum of twelve thousand five hundred dollars, with which her husband had charged himself, had been by him employed for her use. The result was a balance of two hundred and fifty-eight dollars and twelve cents in favor of the husband, which he admits she paid him in cash at the time. It is true this does not purport to be a general settlement of all accounts existing at the time between the parties, but it is also true, that less important sums are charged than that now claimed, and which, if received by the husband to be employed by him, must have been received two months previously. If it had been the intention of the parties that Peychaud should be charged with the proceeds of the note in question, it is not probable that so important an item would have been omitted, and the omission of it renders it probable that it had already been accounted for, or that he had received the proceeds of the note, merely to hand it over to his wife. This settlement was made a very short time before the death of the husband, and was intended to prevent litigation between their respective

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heirs, which might grow out of a previous informal sale of the property by Madame Peychaud to her husband, and it is declared that the consideration of the re-sale is to be credited to the sums with which the husband had charged himself, "*à valoir sur les sommes dont il s'est fait chargé pour elle.*" That she should pay him over in cash a trifling balance of two hundred and fifty-five dollars, when he owed her at the same time nearly twelve thousand dollars very recently received on her account, seems hardly consistent with that caution which appears to have marked her pecuniary transactions with her husband. Upon the whole, we are of opinion the evidence is insufficient to establish this part of her demand.

The claim of Olivier, as creditor for a less amount, has been opposed. The several notes in the record given from time to time, together with evidence that the deceased paid the interest at each renewal, appear to us sufficient to support his claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Probate Court, so far as relates to the claim of Madame Peychaud, be avoided and reversed; and it is further ordered, adjudged and decreed, that she be placed on the tableau as a simple creditor, for the sum of two thousand eight hundred and fifty dollars, in lieu of one thousand dollars; and it is further ordered, adjudged and decreed, that as relates to the other creditors, the judgment of the Court of Probates be affirmed, and that the tableau of distribution as therein corrected and as amended by this decree, be homologated; the costs of this appeal to be paid by the succession.

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PASSEBON vs. HIS CREDITORS.

PASSEBON
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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The creditor who demands the arrest of his insolvent debtor, must set forth the circumstances which induce him to make the oath. But it is sufficient, if these circumstances are disclosed by reference to the petition, schedule or other documents in the cause. A detail of them is not required in the affidavit.

The article 223 of the Code of Practice requires the creditor to swear he *verily believes* the facts in his affidavit; but these words are not sacramental. The affiant may swear, "he *suspects and fears* his debtor is about to depart," &c. and it will be deemed sufficient.

The plaintiff made a surrender of his property on the 29th of December, 1835, for the benefit of his creditors and prayed that all legal proceedings against his person and property be stayed. An order was granted according to the prayer of the petitioner.

On the next day, Edward Vincent, a creditor of the insolvent, filed his petition alleging that "the said Passebon, under false pretences and unfounded allegations had obtained the order staying all proceedings against his person and property."

"From the tenor of the schedule filed, the resources which it was known were within the control of the insolvent on the eve of his insolvency, it is evident he conceals a large amount of his property."

"That the circumstances under which he failed are such as to induce this petitioner strongly to suspect the intentions of said insolvent, and that he has in fact strong reasons to *suspect and fear* that he will avail himself of the stay of proceedings granted to him to keep his person from his creditors, and to run away from the jurisdiction of the court."

He prays that the insolvent be arrested and imprisoned.

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At the foot of the petition, the petitioner annexed his affidavit, declaring the facts it contained to be true, "and that he has *strong reasons to fear* the insolvent will avail himself of the stay of proceedings to leave the state," &c.

Upon this petition and affidavit the insolvent was arrested and imprisoned.

A rule was taken by the insolvent debtor on the petitioning creditor, to show cause why the former should not be discharged.

On hearing arguments of counsel on both sides, the parish judge discharged the insolvent on the insufficiency of the affidavit on which he was arrested.

1. "He decided that a party resorting to an extraordinary remedy, must pursue the requisites of the law strictly."

2. "That the 223d article of the Code of Practice requires the party obtaining the arrest of another, to swear that he *verily believes* the insolvent is about to depart from the jurisdiction of the court, &c. which is not complied with."

3. "That he has not set forth the circumstances specially which induced him to the belief of the facts sworn to, as the above article requires."

The petitioning creditor appealed.

Morphy and Grailhe, for the plaintiff and insolvent.

Soulé, for the appellant.

Martin, J., delivered the opinion of the court.

In this case the insolvent debtor was arrested at the instance of a creditor, under the 223d article of the Code of Practice, on the allegation that he was about to depart from the jurisdiction of the court, and thereby secrete his person from his creditors. On application to the court, the debtor obtained his discharge from the arrest. The creditor who had provoked the arrest, appealed from the decision of the court which ordered the discharge of the debtor.

The discharge was claimed on the ground of the alleged insufficiency of the affidavit on which the arrest was made in

the first instance. It was considered defective, because the affiant did not set forth the facts which it was supposed the insolvent debtor would avail himself of the stay of proceedings which he had obtained, for the purpose of placing his person and property out of the reach of his creditors; and because the affidavit states that the affiant only *suspected or had reason to fear* the insolvent was about to absent or secrete himself, not that *he verily believed so*.

The Code of Practice is explicit in requiring the creditor who makes the oath to set forth the circumstances which induced him to entertain the belief he swears to. It is, however, sufficient if these circumstances are disclosed by a reference to the petition or schedule of the debtor, or to any other document which has been made a part of the proceedings in the cession. There is nothing which requires that they be detailed in the affidavit. This has been done in the present case. The documents on file go to establish that previous to the application for a stay of proceedings against him, the insolvent removed a large sum of money from the banks, and a number of notes and valuable papers, for the purpose of placing them out of the reach of his creditors.

It is true, the Code of Practice in the very article referred to, requires the creditor who demands the arrest of the insolvent debtor, to swear *that he verily believes* the facts which excite his apprehension of the absconding of his debtor. But these very words are not sacramental. It is enough for the creditor to show a fair ground of apprehension in the oath he takes; that the measure which he provokes is necessary to the security of the mass of the creditors, and is justified by the conduct of the debtor.

The line of distinction between *belief* and *strong suspicion* and *fear* of a thing or event happening, is not very easily drawn or made clear. Indeed, a belief of future events happening, is at best, even when sworn to, little more than conjecture; and when a person swears that he *suspects* and *fears* such a thing is going to happen, he of course believes it will take place, but in neither case does he know it. 5 La. Reports, 494. 7 Ibid., 413.

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The creditor who demands the arrest of his insolvent debtor, must set forth the circumstances which induce him to make the oath. But it is sufficient if these circumstances are disclosed by reference to the petition, schedule, or other documents in the cause. A detail of them is not required in the affidavit.

The article 223 of the Code of Practice requires the creditor to swear, he *verily believes* the fact in his affidavit; but these words are not sacramental. The affiant may swear, "he *suspects and fears* his debtor is about to depart," &c., and it will be deemed sufficient.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and that the rule taken on the creditor for the liberation and discharge of the debtor from arrest, be discharged, and that the appellee pay costs in both courts.

CASANOVA'S HEIRS vs. AVEGNO.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
 NEW-ORLEANS.**

Where certain slaves belonging to the community were adjudicated to the widow, the acceptance of a special conventional mortgage by the Court of Probates, with the advice of a family meeting in lieu of the legal one, which affected the whole property of the widow, was held to liberate the slaves from such legal mortgage, as relates to third persons and purchasers.

A person about to purchase property from a tutor, is bound to inquire how the rights of the minors are secured. If he find them secured by a special mortgage, he is justified in concluding that the general mortgage in favor of the minors, has ceased to exist.

This is partly a hypothecary action, and in part an action of revendication against the third possessor of three slaves, to recover one undivided moiety thereof in the plaintiffs' own right, and to enforce a legal mortgage against the other moiety to which said slaves were subject in the hands of their mother as natural tutrix.

The plaintiffs are the heirs, assignees and legal representatives of the late Francisco Casanova, deceased, in 1822, when they were minors, and at which time their mother, Catarina Acosta, took the oath as their natural tutrix. That she failed to render an account of her tutorship, and in July, 1829, an action was brought to compel her to account; to ascertain the balance due to them, and to claim the undivided

moiety of three slaves which had been adjudicated to her. Judgment was rendered in the Court of Probates in their favor, for a large sum, and the adjudication of the property annulled. See the facts of this case in 1 *Louisiana Reports*, 179.

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By the advice of a family meeting, the three slaves, Eulalie, François and Audine, with other community property, by and with the advice of a family meeting, was adjudicated to the mother. In 1827, she sold these slaves to Philippe Avegno, the present defendant.

The plaintiffs in their former suit against Acosta, the mother, having succeeded in annulling the sale and adjudication to her of the community property, now sue for the recovery of the three slaves in question, in their own right, as heirs of their father, and under their legal mortgage against their mother and natural tutrix.

The defendant pleaded the general issue. He, also, averred, that the judgment annulling the sale of the community property to the mother of the plaintiffs, could not affect him, as he was no party thereto; and that he purchased the slaves now claimed before the rendition of said judgment, by public notarial act, and holds them by a just title.

Upon these pleadings and issues, the parties went to trial before the court and jury.

It appeared in evidence, that among the property adjudicated to the mother, was a house and lot in New-Orleans, which the father of the plaintiffs stated in his last will, to be common property. This was declared, by the judgment annulling the adjudication, to be his own property, and that it belonged to him before his marriage.

Previously to this, and when the mother was about to sell the slaves in question to the defendant, she, with the advice of a family meeting, gave a special mortgage on the house and lot, and cancelled the general mortgage on the slaves in favor of the minors. After this transaction, it was that the house and lot was declared to be the property of the father before marriage.

The judge charged the jury in writing, at considerable length; the close of it was excepted to by the counsel for

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the plaintiffs. This was the part wherein the jury were told. "that the defendant is protected by the raising of the general mortgage of the minors by the Court of Probates, in consequence of the special mortgage having been executed and accepted, and that the subsequent avoiding of the said special mortgage, on account both of fraud committed in making the inventory, and of the said special mortgage resting on the minors' own property, cannot affect a *bonâ fide* purchaser and third possessor, who acquired the slaves in contestation from the tutrix of the minors in good faith, while the special mortgage stood recorded, and previous to the suit and judgment annulling it."

The foregoing are the principal facts upon which the cause was decided. The jury returned a verdict for the defendant. From judgment rendered thereon, the plaintiffs appealed.

J. Seghers, for the appellants, contended,

1. That as it relates to the plaintiffs, the sale made by their mother and tutrix to the defendants, is utterly null and void.

2. This sale is null, because the plaintiffs' right of ownership to the undivided moiety of the slaves thus sold, is absolute; resulting from their inheritance from their deceased father.

3. Their right of mortgage on all the property of their mother, as their natural tutrix, is complete for the recovery of any balance due to them under her administration of their property. This embraces the other moiety of the slaves in contest.

4. It follows from the above, that the defendant by his deed of sale, acquired but one undivided half of these slaves, as community property, and the title to this he takes *cum onere*. And this moiety is wholly embraced by the plaintiffs' legal mortgage. 2 *Louisiana Reports*, 524. 3 *Ibid.* 211. 1 *Ibid.* 179.

De Armas, contra.

1. The verdict and judgment must stand, because the case involved a question of fraud, as regards the conduct of the

mother in relation to the community property, and the jury have found in favor of the defendant.

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2. The defendant bought the slaves in question free of mortgage; the general mortgage in favor of the plaintiffs having been previously *raised* by the advice of a family meeting and the order of the Probate Court.

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Bullard, J., delivered the opinion of the court.

The leading facts in this case are sufficiently stated in the case of the *Heirs of Casanova vs. Acosta et al.*, 1 *Louisiana Reports*, 179.

The plaintiffs, heirs of Casanova, having succeeded in that suit against their mother, in annulling the adjudication made to her by the Probate Court, of the property falsely represented to be common, when in truth it was the exclusive property of their father, brought the present action to recover one undivided half of three slaves, purchased by the defendant of their mother, after the adjudication to her, and to hold the whole subject to their legal mortgage, which mortgage had by the advice of a family meeting, and the authority of the Court of Probates, been released on all except certain specific property. This last proceeding had also been annulled in the suit against the mother of the plaintiffs; but as the present defendant was not a party, that judgment must be considered as *res inter alios acta*.

The defendant exhibits, as his title to the three slaves, an act of sale from the widow of Casanova, together with the adjudication to her, of the same property, by the Court of Probates, and the solemn declaration in his last will, by the father of the plaintiffs, that all the property possessed by him belonged to the community.

It is admitted in the petition, that the slaves in question were acquired by Casanova during the marriage, and consequently belonged to the community. As it relates to them, we cannot perceive how there was any fraud in the adjudication to the widow, at their appraised value. One undivided half belonged to the widow on her acceptance of the community, and she acquired, at least in relation to third

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Where certain slaves belonging to the community were adjudicated to the widow, the acceptance of a special conventional mortgage by the Court of Probates, with the advice of a family meeting, in lieu of the legal one, which affected the whole property of the widow, was held to liberate the slaves from such legal mortgage, as relates to third persons and purchasers

A person about to purchase property from a tutor, is bound to inquire how the rights of the minors are secured. If he find them secured by a special mortgage, he is justified in concluding that the general mortgage in favor of the minors, has ceased to exist.

persons, a good title to the other half, subject to the legal mortgage in favor of the minor heirs, of whom she was tutrix. The only remaining question, therefore, is whether the acceptance of a special conventional mortgage by the Court of Probates, with the advice of a family meeting, in lieu of the legal one, which affected the whole property of the widow, liberated the slaves in dispute from such legal mortgage as relates to third persons.

The forms required by law for the validity of such a proceeding, appears to have been observed. The sole ground of nullity is the alleged fraud, which consisted in representing all the property as common, and in the concealment of certain property, and the omission of any mention of it in the inventory. The defendant purchased under the faith of these judicial acts, not only without any knowledge of the alleged errors or fraud, but with a knowledge that the father of the plaintiffs in his testament had declared that the whole property belonged to the community. Whether that declaration alone on the part of the ancestor would preclude the heir in relation to third persons from recovering, it is not necessary to decide; but, coupled with the fact which appears to us abundantly shown in the record, that the price paid for the slaves by the defendant was a debt due by the estate of Casanova, and that in effect the heirs received the price, by a liberation of that charge upon the estate, we consider the proceedings in relation to these slaves as binding on them.

The plaintiffs excepted to a part of the charge of the judge to the jury, on the trial in the first instance. The judge told the jury, that in his opinion, a person desirous of purchasing property from a tutor, is bound to inquire how the rights of the minors are secured; if he find that these rights are secured by a special mortgage, he is justified in concluding that the general mortgage in favor of the minors has ceased to exist, especially when recurring to the Court of Probates, he finds that the special mortgage has been accepted by a family meeting and by the court; and that it is on the responsibility of the under tutor and family meeting, the

special mortgage is accepted ; once accepted and recorded, the general mortgage resulting from the tutorship ceases to exist with regard to third persons. This court fully concurs with the court below on these points of law, and as the jury found accordingly in favor of the defendant, the judgment must be affirmed.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

ZACHARIE'S ADMINISTRATOR vs. PRIEUR ET AL.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The mortgage and privilege of the vendor results from the sale itself, although the conditions of the sale are prescribed by judicial authority or order of court, and the question to which of the parties litigant the proceeds should be decreed is still left open. The mortgage is conventional as soon as the sale is completed.

Where property in dispute is sold with the consent of the parties, by an order of court, and a mortgage retained, the purchaser becomes the debtor to him who is decreed to be the true owner. But at the death of the mortgagor in the mean time, and a sale of this property by order of the Court of Probates, the mortgage is *raised*, and the purchaser takes it free of incumbrance. The mortgage attaches to the *proceeds* in the hands of the administrator.

This case commenced by a rule taken by the plaintiff on D. Prieur and F. W. Lea, commissioners appointed by the parties litigant, and on P. Landreaux, recorder of mortgages, to show cause why certain mortgages should not be erased and cancelled.

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VS.
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The facts show, that in 1833 certain property in front of the city of New-Orleans, being in suit and pending on appeal, between the corporation of New-Orleans and the government of the United States, was by agreement between the parties litigant, sanctioned by a decree of the district judge of the United States, sold out in lots, a mortgage retained on the property, and the proceeds of sale to go to the party to whom the right in the disputed premises should be ultimately decreed.

Messrs. Prieur and Lea were appointed the commissoners, the former by the corporation, and the latter by the United States, to make the sales, and to whom in their official capacity, the notes and mortgages were made payable.

J. M. Zacharie became the purchaser at the sale of this property of three separate lots of ground, for which he gave his notes (the price being payable by instalments) and a mortgage on each, to secure the payment of the price.

Shortly after this sale and purchase, Mr. Zacharie died and a sale of his property ordered by the Court of Probates. The register of wills advertised it accordingly to be sold the 8th of December, 1835.

The recorder of mortgages certified the above mortgages existing on the three lots before stated.

On the 14th of December, the counsel for the administrator of J. M. Zacharie's estate, took a rule on the defendants to show cause why the foregoing mortgages recorded against this property should not be cancelled and erased, to enable the administrator to pass titles to the purchasers to whom the property was adjudicated.

Mr. Prieur, as mayor of the corporation of New-Orleans, answered, denied that the mortgages in question could be raised, because the property was adjudicated under a decree of the United States District Court in the suit between the parties litigant, and that suit still pending on appeal, the mortgages must stand and remain in force until its determination.

The case being submitted to the probate judge on the rule and answer, and documentary evidence on file, it was ordered that the rule be confirmed and made absolute, and that the

recorder of mortgages do cancel and erase the mortgages required by the administrator. EASTERN DIST.
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The mayor appealed on the part of the corporation.

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J. Slidell, for the plaintiff in the rule.

1. The administrator selling the property of the deceased, by order of the Court of Probates, has the right and power to raise and discharge all mortgages on the thing sold, and resulting from the acts of the deceased. The lien attaches to the proceeds in his hands. *De Ende vs. Moore*, 2 *Martin*, N. S., 336. 5 *Louisiana Reports*, 470. 5 *Martin*, 618.

2. The administrator is bound to sell so much of the effects of the succession as is necessary to pay the debts thereof. In doing so, and to effect a sale, the mortgaged property must be released, so that the purchaser take it free of incumbrance. *Louisiana Code*, 1156.

3. The sale in this case could not have been effected without the power to raise the mortgage. The authority to effect a sale, pre-supposes the power and obligation to sell without incumbering the thing sold.

Eustis, for the appellant.

Bullard, J., delivered the opinion of the court.

The administrator of the estate of J. M. Zacharie took a rule on Prieur and Lea, commissioners appointed by the District Court of the United States to sell certain property in the city of New-Orleans, in controversy between the city and the United States, together with the recorder of mortgages, to show cause why certain mortgages retained on the property to secure the payment of the price to the party which might finally prevail in that suit, should not be cancelled, so far as they affected the lots purchased by the deceased, and which had been recently sold by the administrator, in pursuance of a decree of the Court of Probates.

The corporation of New-Orleans, for answer to the rule, deny that the mortgage can be raised by order of the Probate Court, because they say the lots having been adjudicated

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The mortgage and privilege of the vendor results from the sale itself, although the conditions of the sale are prescribed by judicial authority or order of court, and the question to which of the parties litigant the proceeds should be decreed, is still left open. The mortgage is conventional as soon as the sale is completed.

under a decree of the District Court of the United States, in the suit above mentioned, and that suit being still pending on appeal, the mortgage must stand in full force until its final determination.

This answer appears to admit the general principle that mortgages and liens or privileges created by the deceased proprietor, and cut off by a regular sale of the property made under the authority of the Court of Probates in the course of administration, but endeavors to create an exception in the present case, in consequence of the peculiar origin of this mortgage. But the mortgage and privilege of vendor resulted from the sale itself, and although the conditions of the sale were prescribed by judicial authority and the question to which of the parties litigant the proceeds should be finally decreed, was still open, yet the mortgage thus prescribed became one of convention as soon as the sale was complete, and ceased to be under the control of the court of the United States. We cannot distinguish it from the case of the sale of a thing in dispute *pendente lite*, by agreement of parties, even without the consent of the court. The mortgage resulting from the sale would accrue to the benefit of the party who might be finally recognised as the owner, or in other words, who was the real vendor; but the sale would be considered, nevertheless, as a contract, and the mortgage, conventional or legal, as the case might be, as between the vendor and the purchaser. Zacharie consented to the mortgage to secure the payment of the price to the party who might be finally entitled to it. The circumstances which preceded the contract, we think may well be laid out of view, and as both the parties litigant in that case are before the court, it does not appear material which of them may finally be entitled to the price. The real owner became the creditor of Zacharie for the amount of the purchase.

Where property in dispute is sold with the consent of the parties, by an order of court, and a mortgage retained, the

We cannot, therefore, recognise this as a case excepted from the operation of the general rule settled in the cases of *De Ende vs. Moore*, 2 *Martin*, N. S., 336, and of *Lafon's Executors vs. Phillips*, 2 *Martin*, N. S., 224, and which it is admitted is at this time consonant to the positive legislation

of the state. That rule is in fact but a corollary from the admitted principle, that the property of the debtor is the common pledge of his creditors, and that on his decease the pledge may be reduced to money for their common benefit, under the authority of the Court of Probates, and its proceeds distributed by the administrator among them, according to their rank as privileged, hypothecary or chirographic, thereby forming a real *concurso* to which all are parties. If the property be sold to pay the creditors, as well hypothecary as simple, upon what principle can the mortgage creditor pretend that his original mortgage still exists on the property in the hands of the purchaser? The creditor may indeed complain that under the existing laws his rights may be at the mercy of faithless executors, administrators or syndics. But a purchaser at probate sale may well parry such an argument, by answering that such administrator is no agent of his, and it is not his fault if through a defect in the law itself, or the want of vigilance in the creditors, the money he has paid for the property purchased is liable to be wasted, squandered or embezzled.

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purchaser becomes the debtor to him who is decreed to be the true owner. But at the death of the mortgagor in the meantime, and a sale of this property by order of the Court of Probates, the mortgage is raised and the purchaser takes it free of incumbrance. The mortgage attaches to the proceeds in the hands of the administrator.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

LEEDS vs. ZERINGUE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a workman makes a piece of machinery to order, and it is alleged by the employer that it does not suit the purpose intended, and it is not objected that it was unskilfully made, the former will be entitled to recover the price of his work.

The plaintiff brought his action on an account stated against the defendant, for furnishing a sugar-mill roller,

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spur wheel, &c., amounting to four hundred and fifty-three dollars, for which he prays judgment.

The defendant pleaded a general denial. The evidence showed that when the roller of defendant's sugar-mill broke, he told a Mr. Abbot, his engineer, to procure another from one of the foundries in New-Orleans. He at last found one at the plaintiff's, which had been used and received some damage, but he was of opinion it could be made to suit the mill, by being turned and altered. That he directed the plaintiff to have it turned, and informed the defendant, who said it was very well, and to hurry on with it, as there was no time to lose. He sent the roller to the plantation and remained in town to procure another roller for defendant, at the foundry of Mr. Parker. It was put in the mill the next day, in his absence, and the day after, the defendant sent it back to the landing where it had been sent by the plaintiff, saying it was an old one, and would not suit him.

The overseer, who placed the roller in the mill, said it would not fit the place intended, by about an inch. That the defendant stated to Abbot, the engineer, if the plaintiff would make the necessary repairs on the roller, so as to make it suit the mill, he would take it. He was much in want of one to take off his crop. He sent it back the day after he had received it. The defendant, when he sent Abbott for a roller, directed him to go to Foucher's, and then to Parker's foundry, and not to go to plaintiff's.

Foucher, a witness for defendant, saw the roller at the landing and examined it; was of opinion it was not worth any thing, and he would not use it in his sugar-mill at all.

Abbot, examined by plaintiff, and asked if in his opinion the roller in question would with some alterations serve to take off the defendant's crop, says, in his opinion, it would, with two or three hours work, and be made to last three or four years. He estimates roller and appendages as worth three hundred and fifty dollars.

This is the substance of the testimony. The district judge who tried the cause in the first instance, gave judgment in favor of the defendant. The plaintiff appealed.

Lockett, for the plaintiff.

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1. In this case the defendant sent his engineer to plaintiff's foundry, for a sugar-mill roller, and had the articles made and repaired, as requested. The work was made according to direction. The engineer was the agent of the defendant, who is bound by his acts.

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2. There is no evidence of fault or bad workmanship on part of plaintiff. The engineer says the roller was good, and he could have fixed it in two or three hours to suit the purposes of the defendant.

3. The defendant undertook to put up the machinery himself, without his engineer, and failed. It was, in fact, his fault if the work did not suit.

Derbigny, for defendant.

1. The engineer was not authorised to purchase the mill roller from the plaintiff's, and was not an agent; on the contrary, the defendant expressly directed him not to purchase there, but to get the roller at Foucher's or Parker's.

2. But admitting his agency, it did not deprive the defendant of the right to refuse receiving an old roller that had been used in other mills and damaged. By buying such an article of machinery, the agent exceeded his powers and did not bind the defendant.

3. The engineer proves his own agency, and by his own testimony is trying to establish the liability of the defendant. He is not a disinterested witness. If the roller had been sold to defendant, he would have had the right to return it when he discovered it was damaged.

Martin, J., delivered the opinion of the court.

This is an action instituted by the plaintiff, who carries on the business of an iron foundry, to recover from the defendant the price of a sugar-mill roller and spur wheel, which he delivered to the agent of the latter.

The defendant resists this claim on the ground that the roller was unfit for the use to which it was intended to apply it, as it did not fit the place in the mill where it was to be

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placed. It is not pretended or insisted, that it was wholly useless, or that it was unskilfully and inartificially made; but only that it could not be fitted in the mill, for which purpose, it is alleged, it was procured.

From the evidence exhibited in the record, it appears this roller was chosen by the agent of the defendant at the plaintiff's foundry, and under his directions it was turned to a proper size, and adapted to the shape suitable to be used in the sugar-mill. This agent was the engineer of the defendant when the roller of his sugar-mill broke, and was directed to get a new one at one of the foundries in the city. It is not very clear from the defendant's own witnesses, that it could not have been adapted to the sugar-mill, which would have enabled him to grind up his crop of cane, provided the proper means had been made use of, after it was obtained. The defendant's engineer, who procured the roller, was of opinion, and so told his employer, that he could by a few hours' work make it suit the purpose intended.

Where a workman makes a piece of machinery to order, and it is alleged by the employer that it does not suit the purpose intended, and it is not objected that it was unskilfully made, the former will be entitled to recover the price of his work.

It appears the plaintiff did all he was required to do. The objection made, was, that the roller did not suit the mill in place of the first one. The plaintiff did not undertake to prepare the roller for the mill, otherwise than by making it according to the directions of the agent of the defendant, who was present and ordered it. The plaintiff is, therefore, entitled to recover the price of his work.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that the plaintiff do recover of the defendant, the sum of three hundred and fifty dollars with interest, and costs in both courts.

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CARROLLTON RAIL ROAD COMPANY. vs. AVART ET AL.

CARROLLTON
RAIL ROAD CO.
vs.
AVART ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The fact of a rail road company having possessed themselves of a strip of land through the plantation of the defendants and constructed the road through it, does not preclude their instituting suit afterwards and having the land adjudged to them, on assessment and payment of the damages sustained by the owner, according to the provisions of their charter.

This is an action to condemn a portion of land belonging to the defendants, through which the New-Orleans and Carrollton rail road runs for the use and occupation of the rail road. The condemnation of the land in question is sought under the 5th section of the act chartering the company, in 1833. The clause immediately invoked in this suit, reads as follows :

“If the company cannot agree with the owners of lands which may be wanted for the construction of the road, the court shall summon a jury to examine the land required for the road, after ten days’ notice to the owners, to ascertain the damages they may sustain by the appropriation of such land to the uses required by said company, and certify the same to be a true, fair and impartial valuation and assessment, describing the land condemned,” &c. “And such valuation or assessment when *paid or deposited* in court for the owner of said land, shall entitle the company to the right, title and estate and interest in the same as fully as if it had been conveyed by the owners of the same,” &c.

The company prays for the condemnation and appropriation to their use of so much of the lands of the defendants for the construction of their road as is authorised by their charter, on paying such damages as shall be awarded.

The defendants excepted and denied the right of the company to subject them to the present proceedings, because said company having forcibly and without consent taken

EASTERN DIST. possession of their lands and constructed their road thereon,
March, 1836. without having paid them any indemnity, are answerable in
CARROLLTON damages for the trespass and can exercise under their charter
RAIL ROAD CO. in respect to these defendants, none of the privileges granted
vs. thereby, &c.
AVART ET AL.

It was admitted by the counsel for the plaintiffs that the Rail Road Company had already taken possession of the tracts of land belonging to the defendants, and specified in the petition, and had constructed the road thereon.

The case was tried on the exception of the defendants and admission by the plaintiffs. The parish judge sustained the exception, and the plaintiffs appealed.

J. Skidell, for the plaintiffs.

Eustis, contra.

1. That *all the provisions* of the charter authorising the company to take lands for the purposes of a rail road, were predicated on the supposition that the company should *not be in possession* of the lands. This is the only case in which the company can exercise the extraordinary rights given in the charter, it being the only case provided for therein.

2. By the charter, no *right of entry* on lands is given, and the company is bound to resort to the ordinary remedy for *forced expropriation*. See *Louisiana Code*, article 489.

3. The allegations in the exception must be assumed to be true for the purpose of testing their sufficiency as matters of exception. The forcible and unauthorised taking of possession of the land by the company preclude them from resorting to the summary remedy authorised by the charter, which was limited to cases in which the property is in the possession of the owner, and in which the company seeks peaceably and lawfully to divest the owner of it *after paying him a reasonable indemnity*.

Mathews, J., delivered the opinion of the court.

The present suit is instituted in pursuance of the 5th section of the act of incorporation approved on the 9th of

February, 1833. This section of the law authorises the corporation, in the event of not being able to obtain from the proprietors of land, through which the road might necessarily pass, a title by purchase or in any other manner, to apply to the District Court of the first judicial district, or to the Parish Court of the parish and city of New-Orleans, for the purpose of having a jury summoned to assess the damage which may be occasioned to proprietors for such extent of land taken from them as is deemed by the law necessary for the construction of the road, and in this way to obtain titles.

Previous to the commencement of the present proceedings, the Rail Road Company had obtained possession of a quantity of land sufficient for their purposes in making the road, on parcels of ground or small tracts of land belonging to the defendants, and had actually made the road through these premises.

This circumstance is made the basis of an exception to the legality of the present proceeding of the plaintiffs, to obtain title to the property of which they are thus in possession.

The exception was sustained by the court below and the plaintiffs appealed.

The evidence of the case does not show the manner in which they obtained possession, whether forcibly or by consent of the defendants. But it must be presumed from the present pursuit to obtain title, that the possession which the plaintiffs now hold is not based on any title.

How this naked possession can preclude them from taking the steps authorised and prescribed by the act to obtain titles, we cannot conceive. There is no penalty of this kind denounced in the law itself as a consequence of taking property, nor are we acquainted with any provisions of the general laws now in force in this state from which such penalty or prohibition may be deduced.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be reversed and annulled; and it is further ordered, adjudged and decreed, that the cause be remanded to said court to be tried on its merits, and that the appellees pay the costs of this appeal.

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March, 1836.

CARROLLTON
RAIL ROAD CO.
vs.
AVART ET AL.

The fact of a rail road company having possessed themselves of a strip of land through the plantation of the defendants, and constructed the road through it, does not preclude their instituting suit afterwards, and having the land adjudged to them, on assessment and payment of the damages sustained by the owner, according to the provisions of their charter.

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PHILLIS, f. w. c.
vs.
GENTIN.

PHILLIS, f. w. c. vs. GENTIN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A colored person shown to be a *statu libera*, in Pennsylvania, and now past the age at which she was to become free, according to the conditions under which she was held in servitude, and who had resided in another free state, with, or by consent of her owner, *is thereby free.*

Damages will not be awarded against an innocent purchaser of a colored person as a slave who recovers her freedom. It would be otherwise against the person who first violated her rights, by selling her as a slave.

This is a suit to obtain freedom. The plaintiff, a woman of color, alleges she was born free in the state of Pennsylvania, and that she and her two young children are held in slavery by the defendant. She prays that she and her children be adjudged free, and allowed five hundred dollars as damages for their illegal detention in slavery.

The defendant alleges the plaintiff and her children are slaves, and that he purchased them as such, by public or notarial act, passed before the parish judge of East Baton Rouge, and prays that Leon Bonnecaze, his vendor, be called in warranty.

Bonnecaze pleaded various matters not material to be stated.

The facts of the case are briefly recapitulated, from the testimony produced, by the district judge who tried it.

"The evidence in this case, appears to me to establish that the plaintiff, a black woman, was in the year 1814, and when she was of the age of fifteen years, bound as an indented servant at Philadelphia, to one Page, to serve till she was twenty-eight years of age; that after living a year and a half at Philadelphia, she was taken to Pittsburgh, in Pennsylvania. That in the autumn of 1816, Page transferred the time of service of plaintiff to Thomas W. Bakewell, who at that time married his daughter. Bakewell took the

plaintiff to Louisville, and in or about 1819, transferred her time of service to one Zuma, who lived at Cincinnati; she remained at Cincinnati some time, when Zuma took her to St. Louis, where, after some time, he sold her term of service to one Sutton. She disappeared from St. Louis in the latter end of 1822, and the next trace we have of her, is, that she is sold in December, 1823, by Redding Herring to one B. Rhodus; from Rhodus, in 1824, she passed to Sarah Rowell, at the sale of whose succession, in 1830, Bonnecaze became her owner, who, in 1831, sold her to Gentin, against whom the present suit is brought for her liberty. The plaintiff alleges herself to be a free person, and not a slave, and alleges herself to have been born free.

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PHILLIS, f. w. c.
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“There is no evidence that she was born free, but the person in whose possession we first find her, held her as a person indented to service till twenty-eight years of age, which term has elapsed. She was in like manner held as an indented servant by Bakewell, Zuma and Sutton, successively; she also resided with Zuma, in Ohio, a state where slavery has never existed; this fact, according to the principle to that effect, established in the case of *Forsyth vs. Nash*, 4 *Martin*, would entitle the plaintiff to her liberty. If plaintiff was an indented servant in the hands of Page, Bakewell, Zuma and Sutton, it is not seen how she could afterwards become a slave. The plaintiff and her children, seem entitled to a decree for their freedom.

“This is no case for damages; since the institution of the suit, the plaintiff at her own instance, was taken out of the possession of defendants.”

Judgment was entered accordingly. The defendant appealed.

Maybin, for the plaintiff.

1. That the court below decided correctly in admitting the depositions, to the introduction of which bills of exception were tendered.

2. That the judgment as to the question of freedom, is correct.

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3. That the court below erred in not giving damages to the plaintiff, who prays that the judgment may be so amended by this court, that damages may be allowed to her to the amount claimed.

Strawbridge, contra.

Mathews, J., delivered the opinion of the court.

In this case the plaintiff, held in slavery by the defendant, claims her freedom; her right to it is denied, and several persons who had sold her as a slave at different times were successively called in warranty, &c. The court below rendered a judgment declaring her free and from which the present appeal is taken.

The decision of the case depends principally on matters of fact; and the evidence, as it comes up to this court, fully sustains the judgment of the court below. The record, however, contains bills of exception to its introduction. The only one which we deem it necessary to notice is that taken to the admissibility of the testimony of Mrs. Page, taken on interrogatories. An affidavit of one of the counsellors for the plaintiff shows that the witness is a resident of the state of Ohio. It was, therefore, proper to take her testimony on interrogatories. Notice of the time and place of taking it was legally given to the counsel of the defendants, and it was taken by a person authorised to administer oaths. Under these circumstances, it appears to us that no solid objection exists to its admissibility.

A colored person shown to be a *statu libera*, in Pennsylvania, and now past the age at which she was to become free, according to the conditions under which she was held in servitude, and who had resided in another free state, with, or by consent of her owner, is thereby free.

This testimony, together with that of many other witnesses (rightfully admitted) appearing on the record, shows that the plaintiff was a *statu libera* in the state of Pennsylvania, that she is now past the age at which she was to become free according to the conditions under which she was held in servitude, and that she resided some time in the state of Ohio, with or by consent of her owner, a state where slavery or involuntary servitude is not permitted. She is, therefore, clearly now free. Damages were claimed on her part against those who held her in slavery, which were not decreed by

the judgment of the court below. This claim is here repeated in the answer on the appeal. We think they ought not to be allowed against the defendant or any of the warrantors, except the vendor who first violated her rights by selling her as a slave for life ; he would be liable to vindictive damages in a suit regularly brought for that purpose. But it does not appear that he is now before the court in such a manner as to authorise judgment against him for damages in favor of the plaintiff. All others who have had her in their possession appear to have been possessors in good faith.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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March, 1836.

DUFFY
vs.
BYRNE.

Damages will not be awarded against an innocent purchaser of a colored person as a slave who recovers her freedom. It would be otherwise against the person who first violated her rights, by selling her as a slave.

DUFFY vs. BYRNE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the plaintiff failed to prove that he done certain work for the defendant agreeably to a specific agreement as alleged; and also failed to show that his work was beneficial to the latter, he cannot recover, either on his contract or a *quantum meruit*, but will be non-suited.

This is an action to recover from the defendant the sum of nine hundred and eighty-nine dollars and sixty-five cents, for work and labor done in the month of December, 1834, by ditching in front of the property of the latter in the city of Lafayette, &c. The plaintiff alleges he done this work at the special instance and request of the defendant, which will more fully appear by an account annexed.

There was a general denial pleaded. The evidence is correctly noted and stated in the opinion of the court. The district judge was of opinion, the evidence showed that the

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March, 1836.

DUFFY
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plaintiff was entitled to four hundred and ninety-four dollars and eighty-two cents. Judgment was rendered accordingly. The defendant appealed.

M'Kinney, for the plaintiff.

Peirce, contra.

Bullard J., delivered the opinion of the court.

This is an action to recover the value of labor done in ditching round certain lots of the defendant, at his special instance and request. The defendant pleaded the general denial. The plaintiff recovered about half the sum demanded by him, and the defendant appealed.

The only contract proved, was that the plaintiff might do such ditching round the lots as might be ordered by the police jury of the parish of Jefferson, and he was instructed to apply to Mr. Charbonnet for instructions. After the ditching was done, the defendant told the plaintiff that if he would procure a certificate from Mr. Charbonnet, that the work was done in conformity to the orders of the police jury of Jefferson, he would pay it. No such police regulation is shown, nor does it appear that Charbonnet gave to the plaintiff any instructions. The plaintiff has, therefore, failed to show any private contract which entitles him to recover. Nor is it shown that the work done has benefited the defendant. On the contrary, it would appear from the testimony of the witnesses, that the ditches are not deep enough to drain the lots, and are neither required by any police regulation nor of any utility to the owner. Some of the witnesses even tell us that it would cost more to drain the lots now, than if no ditches had been dug, as they are filled with water.

Where the plaintiff failed to prove that he done certain work for the defendant, agreeably to a specific agreement, as alleged, and also failed to show that his work was beneficial to the latter, he cannot recover, either on his contract or on a *quantum meruit*, but will be non-suited.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled, and that there be judgment in favor of the defendant, as in the case of a non-suit, with costs in both courts.

EASTERN DIST.
March, 1896.

STRAWBRIDGE
vs.
TURNER ET AL.

STRAWBRIDGE vs. TURNER ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where the owners of a steam-boat suffered a slave to be employed as a hand on board, by the captain, without the authority and consent of his owner, and he was accidentally drowned: *Held*, that the owners of the boat were responsible, and liable to pay his value, because by using due diligence they might have prevented the illegal employment of the slave, but did not.

This is an action by the plaintiff to recover from the defendants, owners of the steam-boat Chesapeake, the value of a slave alleged to have been illegally employed by the captain of the boat, as a hand, without the authority or consent of the plaintiff, and while in this service, was drowned.

This cause has once before been in this court. See 8, *Louisiana Reports*, 537. On its return to the Parish Court, the plaintiff had leave to amend his petition, by adding to his former allegation the further one, "which act of the said master, the said owners might have prevented, by using due diligence."

The cause was again submitted to a jury who returned a verdict of seven hundred dollars for the plaintiff. From judgment rendered thereon, the defendants appealed.

Strawbridge, in propria personâ.

Preston, for the defendants.

1. This case presents *purely a question of law*. The facts proved by the plaintiff and defendants are substantially the same. Indeed, I will suppose the plaintiff to have proved precisely what he alleges in his petition, "that Wright" (the master) "received on board said boat a slave named Stephen,

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vs.
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the property of your petitioner, and continued to employ him as a hand on board said boat to Alexandria and elsewhere," (that is back) "without the knowledge or permission of petitioner, which *acts of said master* the said owners might have prevented by using due diligence."

2. To render the defendants liable on the allegation in the petition, the loss must be caused by their act, or occasioned by their negligence, imprudence, or want of skill. *Louisiana Code*, 2294, 2295. The damage must be immediately caused by the act, &c. itself. 11 *Toullier No.* 117.

3. It is alleged further, in the petition, that "when the plaintiff had said slave arrested on board said boat, in endeavoring to escape, said slave fell or jumped overboard, and was drowned."

This drowning was not caused by the hiring of the slave, but, in the words of the petition, by "his attempting to escape when arrested." It was caused entirely and immediately,

First. By the unskillful manner in which the master attempted to arrest the slave.

Second. By the physical force of the slave overcoming that of his captors.

Third. By the evil disposition of the slave, which prompted him to risk his life rather than be arrested. For none of these acts are the defendants responsible.

4. The captain (Wright) being utterly unable, from the nature of his situation, to hire, personally, every man to be hired on a coasting boat, charged his mate to procure firemen, and in doing so, cautioned him "not to hire any slaves, unless they produced satisfactory proofs of the consent of their masters." This is the only connexion he had with the act which it is alleged caused the damage. Can he be rendered liable for this?

5. The slave was a runaway, as is proved, and was arrested *where* he was hired, by his master, in an unskillful manner. "That want of skill, connected with the physical force and bad disposition of the slave, caused the loss" which it is now attempted to be inflicted on the owners, through the acts of the master.

Martin, J., delivered the opinion of the court.

The plaintiff claims the value of a slave, employed as a hand on board the steam-boat Chesapeake, by the defendants, (without his authority or consent,) and who was drowned by jumping or falling overboard. This case was before this court last year, and remanded for a new trial. See 8 *Louisiana Reports*, 537.

After the cause was remanded, and before the second trial, the plaintiff amended his petition, by the addition of an averment, that the defendants, by due diligence, might have prevented the slave being employed as a hand. The parties went to trial on this additional allegation to the former cause of action. There was a second verdict and judgment for the plaintiff, and the defendants appealed.

The fact of the slave being employed as a hand on board the steam-boat, was fully proved. It further appears, that the plaintiff, on hearing his slave was on board, went there with the intention of arresting him, and in the attempt, the boy, in endeavoring to effect his escape, fell overboard and was drowned.

The defendants' counsel urged with some earnestness, in the argument of the case, that the hiring and employment of the slave, was not the immediate cause of the drowning; but that it was occasioned immediately by the pursuit of the master.

The plaintiff on the other hand, produced evidence, which shows clearly the want of due diligence in the owners of the steam-boat, in suffering the slave in question to be engaged for several days, in unloading and loading her in the city of New-Orleans, where they resided. This they could have prevented and did not.

The plaintiff has had two verdicts in his favor. His slave absconded, and went on board the steam-boat in an illegal and improper manner. He was illegally and without authority hired by the master, of which fact the jury seem to have believed the owners had notice. It does not appear that they made any inquiry, whether he was employed on board with or without the knowledge and consent of the

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STRAWBRIDGE
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Where the owners of a steam-boat suffered a slave to be employed as a hand on board, by the captain, without the authority and consent of his owner, and he was accidentally drowned: *Held*, that the owners of the boat were responsible and liable to pay his value; because by using due diligence, they might have prevented the illegal employment of the slave, but did not.

EASTERN DIST. plaintiff, his master. The verdict must therefore stand, and
March, 1836. remain undisturbed.

**BONILLA,
 SYNDIC, ETC.
 vs.
 MERLE ET AL.**

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

BONILLA, SYNDIC, &C. vs. MERLE ET AL.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
 NEW-ORLEANS.**

A delegation includes a novation by the extinction of the debt due from the person delegating, and the obligation contracted by the new debtor to the common creditor.

Delegation contains a double novation, where the person delegated is the debtor of the person delegating. The former, to acquit himself of his obligation to the latter, contracts a new obligation to the creditor. Novation takes place, both of the obligation of the person delegating, by giving a new debtor, and of the person delegated, by the new obligation he contracts to the common creditor.

If the person delegated be not debtor of him delegating, still, if he obligates himself to pay, he is bound, and cannot resist payment, only saving his recourse against the person delegating him,

So, where A requests B, his factor, to pay C one thousand nine hundred and eleven dollars, who replies he will, *when put in funds*, and advises A he has promised C to do so. But the latter not getting his money as soon as expected, applied several times to A, his original debtor, to remit him the money, and does no act, in the meantime, to release B from his conditional promise to pay him: *Held*, that it was a delegation of a new debtor from A to C, and B became absolutely bound on getting in funds.

The creditor, by the promise of the person delegated, has two bound, to either of whom he may resort for payment. If the original debtor makes

payment after delegating another, he will have his recourse against the latter; but until payment, his right against the delegated debtor to the common creditor, is suspended.

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SYNDIC, ETC.
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MERLE ET AL.

When B, the defendant, was put in funds, he became absolutely bound to C; he might have again become so to A, if it was shown the latter had paid C.

This is an action instituted by the plaintiff, as syndic of the creditors of one Carlos Vidal, in Havana, against the commercial firm of John A. Merle & Co., of New-Orleans, claiming a balance from the latter of one thousand nine hundred and eleven dollars and thirty-seven cents, resulting from commercial dealings and transactions between them.

The defendants pleaded the general issue, and denied that they were indebted to, or had any funds of Vidal in their hands whatever.

The evidence showed that Vidal had consigned to the defendants merchandise to sell, as his factors, and to employ the proceeds in the purchase and shipment of goods to his order and directions.

On the 12th June, 1834, Vidal wrote Merle & Co. as follows: "According to an account which I have this day liquidated with Carlos Magnin, I owe him one thousand nine hundred and eleven dollars and thirty-seven cents. I hope you will do me the favor to pay him the same, and put me in cash for the amount of the bills of exchange, &c., which W. B. Smith has sent to you, according to his account of this date; discounting all said bills and accounts, and holding the proceeds in your hands, subject to my drafts at sight."

On the 25th of the same month, Merle & Co. wrote to Vidal on the subject of the purchase of flour for his account, and in reply to his, in which they say, "You wish us to put in cash to your account the proceeds of the bills and accounts which W. B. Smith has sent to us; and as we have not yet received his instructions respecting them, we cannot comply with your wishes. Besides, it would not be possible for us to make any advance on the bills, because we cannot make use

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March, 1836. have agreed with Mr. Magnin that so soon as you shall place
 us in funds, we will account to him for the one thousand nine
 hundred and eleven dollars and thirty-seven cents, which you
 owed him.”

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Vignie, a witness for defendants, and a clerk in their house, says, “Vidal never answered this letter; that Vidal’s letter was received on the 23d of June, 1834, and answered, as it appears from the foregoing extract, on the 25th of the same. On the 13th of September following, the defendants made the entries on their books, by which it resulted that they had sold enough of the produce of Vidal to warrant them in making the promise they did to Magnin, in which they considered the assignment from Vidal to Magnin valid.”

“That Magnin himself brought the letter of Vidal to Merle & Co., and demanded the execution of the assignment. He was going to New-York and from thence to Liverpool, and requested Merle & Co. to remit him Vidal’s funds to the latter place, which the former promised to do, so soon as they would have sold Vidal’s produce to an amount sufficient. Vidal never answered Merle & Co. on the subject of the assignment to Magnin, and Merle considered it as a thing perfectly settled.”

On the 25th June, as above, Magnin wrote from New-Orleans to Vidal: “No use can be made of the bills which W. B. Smith has sent to Merle & Co. By the first opportunity which will offer for New-York, I beg you to remit to Mr. W. Merle the one thousand nine hundred and eleven dollars which you have belonging to me. I would be pleased if you could procure a bill at eight days’ sight. I leave the day after to-morrow for New-York.”

On the 15th July, Vidal acknowledges the receipt of Merle & Co.’s letter of the 25th June. He says, “As respects the funds which W. B. Smith has placed in your hands in bills, one is already due, which I hope will have been collected without difficulty. I hope you will place the same to my credit, as he instructs you in the enclosed letter; and as to the two bills of exchange which fell due in Sep-

tember and November, as they are endorsed, you can easily buy flour with them, and in that case ship it to me by the first Spanish vessel.”

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On the 7th August following, Magnin wrote to Vidal from New-York, saying, “I am very much surprised not to have received an answer to the letter which I sent to you on the 25th June, begging you to remit me the one thousand nine hundred and eleven dollars which you have belonging to me. Mr. Merle has received no letter from you. I know not the motive of your silence. Do me the favor to remit this sum to Mr. Merle, who has orders to send me the amount to Liverpool.”

On the 26th August, he wrote again to Vidal from New-York: “I have received yours of the 9th instant. No money is to be had. I therefore beg of you, &c., to remit the amount in sterling money to Liverpool.” On the 12th of August he wrote from New-York to Merle & Co. as follows: “I came here on the 29th ultimo. I have delayed until now writing to you, in the hope of receiving letters from Carlos Vidal. I have only received from him an unimportant letter which you were so good as to forward to me. I pray you, gentlemen, in case *he has, or shall*, remit to you the one thousand nine hundred and eleven dollars and thirty-seven cents which he owes me, to remit the same to me at Liverpool.”

On the 25th September, Merle & Co. wrote to Vidal, in which, among other things, they say: “Our mutual friend, Don Carlos Magnin, before leaving here, told us that you would remit to us the balance which you owed him of one thousand nine hundred and eleven dollars and thirty-seven cents, and directed us to forward it to him in Europe; therefore be pleased to remit us said funds, &c.”

The evidence further shows, that on the 13th September, Merle & Co. made an entry in their books, debiting Vidal with one thousand nine hundred and eleven dollars and thirty-seven cents, with interest from the 25th June previous, and crediting Magnin for this sum. It does not appear they ever informed Vidal of this debt until after his failure.

The parish judge was of opinion “no actual and legal assignment or transfer of a debt from Vidal to Magnin, and

EASTERN DIST. an acceptance of the same by John A. Merle was shown,"
March, 1836. rendered judgment in favor of the plaintiff for the amount of
 his claim. The defendants appealed.

**BONILLA,
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 MERLE ET AL.**

J. Slidell for the plaintiff.

1. On the receipt of Vidal's letter of 12th June, Merle & Co. had in their hands no money belonging to him. They positively refused to accept his order, and Magnin expressly repudiated it by directing him to remit funds in another manner. The letters of both Magnin and Merle & Co. show clearly, that no assignment was made of funds to the credit of Magnin.

2. The acceptance by Merle & Co. of Vidal's order, was necessary to vest the amount in Magnin. They were under no obligation to accept drafts for a portion of any parcels held by them. See *Rusael vs. Ferguson*, 7 *Martin, N. S.* 519. *Miller vs. Brigit*, 8 *Louisiana Reports*, 536.

3. The funds of Vidal would, at any time, have been subject to attachment in the hands of Merle & Co. Had nothing been received from bills, or sales of produce, it is not pretended that Merle & Co. would have been responsible to Magnin. Had Vidal become indebted to them, they could have confiscated parcels of property or of bills, with such debt. These facts are wholly inconsistent with the idea of any valid assignment in favor of Magnin.

Eustis for defendants.

1. It appears from the correspondence that Vidal owed Magnin one thousand nine hundred and eleven dollars and thirty-seven cents, which debt has not been paid. Vidal directed John A. Merle & Co. to pay it to Magnin. They assumed to pay the sum to Magnin, when Vidal should put them in funds; they notified Vidal of their conditional promise to Magnin, to which he, Vidal, by his silence, assented. Thus the contract stands between the parties.

2. This contract has never been discharged. Magnin has not been paid, and his attempts to get the money from Vidal do not release Merle & Co., who remain bound by their ori-

ginal assumpsit, which, in its essential features, may be assimilated to a continual acceptance of a bill of exchange. EASTERN DIST.
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Mathews, J., delivered the opinion of the court.

In this case the syndic of the creditors of Vidal, an insolvent, residing in the city of Havana, in the island of Cuba, sues to recover from the defendants one thousand nine hundred and eleven dollars and thirty-seven and a half cents, which he alleges they owe to the estate of the insolvent, as having been his debtors to that amount previous to his failure, &c.

They resist payment to, or a recovery by, the present plaintiff, on account of having assumed to pay this sum to one Magnin, at the request, and in pursuance of the order of Vidal, the latter having acknowledged himself to be indebted to this amount to the former. Judgment was rendered in favor of the plaintiff by the court below, from which the defendants appealed.

The principal difficulty in the decision of the case, as it is presented to the court, arises out of the question, to which of the two, Vidal or Magnin, are the defendants legally obliged to pay the money in dispute. They are clearly debtors to one or the other, according to evidence furnished by themselves in the exhibition of extracts from their book of accounts; but they cannot be debtors to both, on agreements or implied contracts relating to only one and the same debt, and if they are debtors to one of these persons alone, and he be Magnin, to whom they were requested to pay by Vidal, it must be on account of their assumpsit to the former having released them from, or suspended their obligation to the latter.

The truth of this position depends upon the evidence of the case. Most of the important facts are to be ascertained by the examination of a correspondence between the defendants and Vidal, and letters from Magnin to the latter and to the former.

On the 12th of June, 1834, Vidal wrote from Havana to the defendants, (who, from the tenor of his letter, appear to have been his factors in New-Orleans) and states to them, that on liquidating accounts with Magnin, he owed him one

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SYNDIC, ETC.
VS.
MERLE ET AL.

A delegation includes a novation by the extinction of the debt due from the person delegating, and the obligation contracted by the new debtor to the common creditor.

Delegation contains a double novation, where the person delegated is the debtor of the person delegating. The former to acquit himself of his obligation to the latter, contracts a new obligation to the creditor. Novation takes place both of the obligation of the person delegating, by giving a new debtor, and of the person delegated, by the new obligation he contracts to the common creditor.

thousand nine hundred and eleven dollars and three rials, and requested them to pay that sum to Magnin. In the same letter, mention is made of certain bills of exchange and accounts which had been forwarded to them by one W. B. Smith, to be collected for the benefit of Vidal, on which he requests his agents to put him in cash by discounting them, &c. This letter contains no positive information of any particular funds of the writer in possession of his correspondents, out of which Magnin was to be paid. In truth, it contains no expressions from which an implication can be drawn, that they were his debtors at that time; consequently, the order to pay Magnin must be viewed as a simple request on the part of Vidal, without any assignment of a debt due to the latter by the defendants, or indication of any particular fund out of which payment was to be made; and this appears to have been the understanding of Merle & Co. on this subject, for in their answer to Vidal, they inform him that they had agreed to pay Magnin, when they should be put in funds by his debtor. The creditor, after this conditional promise made to him by the defendants, applied directly to Vidal for payment, as appears by several letters addressed to that gentleman; and, about the same period, he requested Merle & Co. to transmit to him at Liverpool the amount of the debt, if it should be remitted to them by Vidal.

According to these facts, the case assumes a greater similitude to what is termed, in our law, delegation, than to any other species of contract; it, perhaps, wants the entire requisites of a complete delegation, as it does not appear that the persons delegated were debtors to the party delegating them, at the time of the delegation. But if they assumed to pay on his request, they stand in the same situation in relation to the creditor, as if they had really been indebted to the person delegating them.

Before the adoption of our codes, the law in respect to novation predicated one in every case of delegation. In *Pothier's treaties on obligations*, it is laid down as a rule on this subject, "that a delegation includes a novation by an extinction of the debt from the person delegating, and the obligation

contracted in his stead by the person delegated. Usually, a delegation contains a double novation, for ordinarily, the person delegated is a debtor of the one delegating, and the former, to acquit himself of his obligation to the latter, contracts, by his order, a new obligation to the creditor of the person delegating. In this case, there is a novation both of the obligation of the person delegating, by giving to his creditor a new debtor, and of the person delegated, by the new obligation which he contracts."

"If the person delegated were not in truth the debtor of the person delegating him, still, if he enter into an engagement to pay, his obligation will not be less binding, and he cannot resist the payment of it, saving his recourse against the person delegating him." *Pothier's obligations, Nos. 565 and 566.*

It is, however, declared in the Louisiana Code, article 2188, that "the delegation by which a debtor gives to his creditor another debtor, who obliges himself towards such creditor, does not operate a novation, unless the creditor has expressly declared that he intends to discharge his debtor who has made the obligation."

This provision of the Code, from the very terms in which it is expressed, relates only to the novation which was operated by law previously in force, as between the original debtor and creditor, and does not touch that novation which formerly existed by effect of law, between the original debtor and the debtor delegated.

Merle & Co. did not assume to pay absolutely the debt of Vidal to Magnin; the assumpsit was on condition of getting into their hands funds of his debtor, to the amount requested to be paid. The evidence shows completely, that they had funds, and it does not appear that they have been released from their obligation to Magnin, (and the condition being performed they must be considered as absolutely bound by their promise) by any act of him or Vidal, the original debtor, by making payment himself. We say that Magnin did nothing to exonerate Merle & Co., for his subsequent application to Vidal for payment, cannot be so construed as to

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If the person delegated be not debtor of him delegating, still if he obligates himself to pay, he is bound, and cannot resist payment; only saving his recourse against the person delegating him.

So, where A requests B, his factor, to pay C one thousand nine hundred and eleven dollars, who replies he will *when put in funds*, and advises A he has promised C to do so, but the latter not getting his money as soon as expected, applied several times to A, his original debtor, to remit him the money, and does no act in the meantime to release B from his conditional promise to pay him: *Held*, that it was delegation of a new debtor from A to C, and B became absolutely bound on getting in funds.

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have this effect, because, according to the article of the code just cited in relation to these parties, there was no novation; but, as we have already stated, it is impossible that the defendants can be considered as absolute debtors for the same debt, and at the same time to both Vidal and Magnin. They are, however, absolute debtors, by their promise, to the latter; therefore, they are not such to the former.

According to our laws as they now exist, although the novation which formerly took place between the debtor delegating, (creditor of the one delegated,) and this last is not expressly destroyed by the code; yet, as novation does not result from the contract, as between the original debtor and creditor, by which the former is freed from his obligation to the latter, injustice might result by tolerating novation between the person delegating and the delegated, so as to extinguish absolutely and forever, the obligation of the latter to pay the former. The creditor, by the promise of the person delegated, has two bound to him, to either of whom he may resort for payment; and if his original debtor should make such payment after the delegation, he ought then to have recourse against the person delegated, his former debtor. But until such payment and extinguishment of the original obligation, his right to pursue the person once debtor to him alone, who, by his orders, has bound himself to pay to another for him, must be suspended, or we shall fall into the absurdity of making the person delegated debtor to two for the same thing, and at the same time, and thus subject him to pay twice, which would be unjust.

The creditor, by the promise of the person delegated, has two bound, to either of whom he may resort for payment. If the original debtor makes payment, after delegating another, he will have his recourse against the latter. But until payment, his rights against the delegated debtor to the common creditor, is suspended.

When B, the defendant, was put in funds, he became absolutely bound to C. He might have again become so to A, if it was shown the latter had paid C.

As the cause now appears, the defendants are debtors, absolutely, to Magnin, and may again become so to Vidal, when it shall be shown that he has paid Magnin.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be avoided, reversed and annulled, and it is further ordered, that judgment be here entered for the defendants, as in case of non-suit, with costs in both courts.

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LOUISIANA STATE BANK vs. SENECA.

LA. STATE BANK
vs.
SENECAL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

In taking judgment by default, and making it final in the absence of any defence, on proving the plaintiff's demand, no evidence can be legally given of a fact *not alleged*.

This is an action to recover from the defendant the sum of four thousand dollars, as endorser of A. L. Boimare, The plaintiff alleges, that the note was protested for want of payment when it became due, as may appear by the said note, and a certified copy of the *protest thereof annexed to this petition*. That the drawer, A. L. Boimare, has become insolvent, and made a surrender of his property to his creditors, and that the defendant, though often amicably requested, has refused to pay, &c.

There was no defence. Judgment was first taken by default, and then confirmed against the defendant for the sum claimed.

The court, in giving its reasons for the judgment, says, it is satisfied that the signature at the foot of the note sued, as well as the endorsement on it, are genuine, and that due notice of the protest of said note was given to the defendant, &c. The defendant appealed.

Hennen, for defendant, assigned for error apparent on the face of the record, that there was no allegation of notice of protest in the petition.

Grima, for the plaintiff, contended, that the appeal could not be maintained, because nothing which might have been cured by legal evidence in the court below, can be assigned as error, when the appeal comes up without the evidence. 12 *Martin*, 304. 1 *Martin N. S.*, 599. 2 *Ibid.*, 537. 2 *Ibid.*, 265. 6 *Ibid.*, 640. 2 *Louisiana Reports*, 225. 3 *Ibid.*, 489, 481.

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2. If testimony be offered on a point not presented by the pleadings, and is not objected to, or approved, the parties will be bound by the effect of the testimony, and it will be considered that all objections are waived. 9 *Martin*, 317. 11 *Ibid.*, 26. 6 *Martin N. S.*, 86.

Hennen, for the defendant.

1. The present case differs from those cited by the plaintiff's counsel. This is a judgment by default, confirmed without appearance or defence, and there could be no consent to receive evidence on points not alleged in the petition. The cases cited were at issue, and the defects cured by waiving objections to them.

2. The certificate of the judge does not show that there was any evidence offered which could cure the defects in the pleadings, for want of an allegation of notice.

3. From the certificate of the judge, it does not appear what the testimony was. This certificate cannot be taken for a statement of facts, for it was made on the return of a *certiorari*, after the appeal was taken. The judgment must, therefore, be set aside.

Martin, J., delivered the opinion of the court.

This is an action against the endorser of a promissory note. The defendant failed to answer, and judgment by default was taken, which was made final without any defence being put in.

The defendant having appealed from the final judgment, he seeks to reverse it in this court, and assigns, as an error apparent on the face of the record, that it is no where alleged that notice of protest was given to him.

In taking judgment by default, and making it final in the absence of any defence, on proving the plaintiff's demand, no evidence can be legally given of a fact not alleged.

The counsel for the bank urges that notice may have been proved on the trial, and before obtaining final judgment. He further contends, that no defect of pleading can be assigned as error on the face of the record, which might be cured by legal evidence.

This would be correct, if there had been a trial on an issue made up by filing an answer, for then the consent of the

party might be inferred, from the want of objection being made to the omission or defect. But, in the absence of any defence, no evidence can be legally given of a fact not alleged in the petition.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and that there be judgment for the defendant, as in case of a non-suit, with costs in both courts.

CHALARON vs. M'FARLANE ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The general provisions of the Louisiana Code, article 3035, excluding judicial sureties from the benefit of the plea of discussion, does not extend and apply to sureties in appeal bonds.

From the very nature and tenor of the obligation contracted by the surety in an appeal bond, he is not bound to pay, until all the property of every kind, belonging to the principal, is first taken, and proves insufficient.

Where a surety signed a blank appeal bond, to be used in a particular way by his principal, who puts it to a different use from that intended, by which the responsibility of the surety is greatly increased: *Held*, that the surety cannot avail himself of this matter, unless it is shown the appellee or obligee of the bond was connusant of the fraud.

This case comes up on a rule taken by the plaintiff, on J. S. M'Farlane, a surety in an appeal bond, to show cause within ten days why judgment should not be rendered against him for the sum of one thousand seven hundred and thirty-three dollars and thirty-three cents, with interest, being the amount decreed against the defendant in the appeal.

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The record shows, that the present plaintiff, having obtained judgment against one Vance for the above sum, the latter appealed and gave M'Farlane his surety. The appeal was taken within the ten days, and operated as a suspensive appeal. The judgment was confirmed with damages. An execution issued against Vance, and the sheriff returned he had seized four lots of ground, but that the sale was stayed by order of the Parish Court, the defendant, Vance, having made a cession of his property. On exhibiting this return on the *fieri facias*, a motion was made that James S. M'Farlane, the security for the defendant in the appeal bond, show cause within ten days, why judgment should not be rendered against him.

In answer to the rule, M'Farlane admitted he signed the bond, but says he gave a blank bond, which was intended only to be used on an appeal to cover costs; and that it has fraudulently or by mistake been filled up and used in a suspensive appeal, so as to render him liable for the amount of the debt and costs; and that he prays for a trial by jury.

Upon these pleadings the case was tried by the court. The district judge presiding, decided that the defence to the execution of the bond would be unavailable, if true. Judgment was rendered on the rule for the amount demanded. The defendant appealed.

Canon, for the plaintiff.

1. The motion or rule of the plaintiff, to render the surety in the appeal bond liable, and have judgment for the amount of the debt, interest, damages and costs, is predicated upon the authority of the *Code of Practice*, article 596.

2. The surety filed his answer to the rule, and set up his defence; upon this issue, judgment was rendered for the plaintiff. The above article in the *Code of Practice* authorises judgment against the surety, on mere motion.

3. The defendant cannot avail himself of the plea of discussion. It is expressly provided, that judicial sureties, such as in this case, cannot demand the discussion of the property of the principal debtor. *Louisiana Code*, 3035.

4. This is a summary proceeding, by *mere motion*, in which a trial by jury cannot be had. *Code of Practice*, 754, 755, 757. EASTERN DIST.
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Gray, for the defendant, contended for the right to have his allegation of fraud, in obtaining the defendant's signature to the appeal bond, tried by a jury.

2. It was further urged, the defendant was entitled to the plea of discussion, and that all the property of the principal be first sold, before the surety was bound to pay any deficiency.

Martin, J., delivered the opinion of the court.

The defendant seeks the reversal of a judgment, which was rendered against him, as surety in an appeal bond with one Vance.

It appears from the evidence, that four lots of ground belonging to Vance, were seized on an execution which issued on a judgment obtained against the latter, and affirmed by this court. The sale of the property seized was stayed, in consequence of a surrender made by Vance, of his goods, for the benefit of his creditors.

According to the *Code of Practice*, article 579, the condition of the appeal bond is, that the appellant shall satisfy any judgment that may be rendered against him, or the same shall be satisfied by the sale of his estate, real or personal; otherwise the surety shall be liable in his place. It is clear, therefore, from these expressions, that if the appellant does not satisfy the judgment, a sale of his estate, real and personal, is to take place; and if the proceeds of this sale prove insufficient, then the liability of the surety begins.

It appears to this court, that notwithstanding the general provision in the Louisiana Code, article 3035, excluding judicial sureties from the benefit of discussion, it seems to be different as regards sureties in appeal bonds. From the very nature of the obligation, and the terms of their engagement, they derive the right of resisting a recourse on them, until it is clearly shown by the creditor, that the sale of all the

The general provisions of the Louisiana Code, article 3035, excluding judicial sureties from the benefit of the plea of discussion, does not extend and apply to sureties in appeal bonds.

From the very nature and tenor of the obligation contracted by the surety in an appeal bond, he is not bound to pay, until all the property of every kind, belonging to the principal, is first taken, and proves insufficient.

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estate and effects of the principal has proved insufficient to discharge his demand.

It is true, in the present case the money cannot be made on the execution. But the code does not speak of a sale under execution particularly. For any thing that appears in the record, the plaintiff may still be fully paid by the sale of the four lots under seizure. It is to be presumed he secured his privilege and mortgage on them, by registering his judgment. These lots, it is true, have become the property of the mass of the creditors, by the surrender, but are nevertheless subject to the creditors' privilege and mortgage, who is also included in the mass. They are still in pledge for the sale, the original price of which is to be paid out of their proceeds.

The contract of suretyship is one, the performance of which imposes as sacred duty and obligation on the party obligating himself, as that resulting from any other contract; but its performance in good faith, is not inconsistent with the right and privilege allowed the surety, to avail himself of any exception or provision of law, introduced for his benefit and protection.

The recourse of the plaintiff, in this instance, against the defendant was premature. The surety is not bound to pay, until all the property, both real and personal, is first exhausted. This does not appear to have been done in the present case.

Where a surety signed a blank appeal bond, to be used in a particular way by his principal, who puts it to a different use from that intended, by which the responsibility of the surety was greatly increased: *Held*, that the surety cannot avail himself of this matter, unless it is shown the appellee or obligee of the bond was connusant of the fraud.

This view of the matter, seems to render it unnecessary, that we should act on another plea set up by the defendant, in which he prays for a trial by jury. We have, however, considered it, on the ground that the expression of the opinion of this court in relation to it, may prevent another suit. This plea is founded on the averment, that the defendant signed a blank appeal bond, with the assurance that it was only to be used in case of a devolutive appeal being deemed necessary, in which case he would only be liable for costs, but that the bond was afterwards, without his knowledge and consent, filled up for a suspensive appeal,

by which he was rendered liable for the whole debt and costs. EASTERN DIST.
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The court is of opinion, that the decision of the district judge was correct, in which he held, that even if this fact was true, it could not avail the surety, unless it was shown that the appellee was cognizant of the fraud.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the motion for judgment on the bond, or rule to show cause, be discharged, the plaintiff paying costs in both courts.

JOUETT vs. ERWIN ET AL.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE OF
THE SECOND PRESIDING.

An instrument of writing, acknowledging the receipt of certain notes for collection, and the money to be handed over, *or the notes returned when called for*, does not come within that class of obligations which are prescribed in five years. No prescription runs against it, until some act is done by which a right of action accrues.

A receipt for notes to collect and pay over, or return when called for, is rather evidence of a mandate than an obligation to pay money, in which the subscriber to the instrument of writing constitutes himself an agent to secure and receive payment, and pay over the sums collected, &c.

This is an action brought by the plaintiff, in October, 1832, against the surviving widow and heirs of the late Joseph Erwin, on the following instrument of writing :

“I have this day received from Thomas Jouett, two notes of hand signed by Abraham Wright, the capital [principal]

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unpaid of which notes remaining due, amounts to five hundred dollars. I have received the above notes for the purpose of securing their amount, if practicable, without suit, and if so secured, and by me received, to be paid to the said Jouett or his order, and if not so secured, the said notes are to be returned when called for by him." "Joseph Erwin."
"Iberville, 6th March, 1823."

The defendants pleaded a general denial, and the prescription of five years.

Upon these issues, the cause was submitted to the court. The district judge presiding, was of opinion that the instrument of writing sued on, being payable to order, and transferable, was included in the class of bills and notes, and prescribed against by the lapse of five years, according to the article 3505 of the *Louisiana Code*.

Judgment was rendered in favor of the defendant. The plaintiff appealed.

Ives and Edwards, for the plaintiff and appellant.

1. The judgment of the court below is erroneous and should be reversed, because the instrument sued on is not negotiable, and therefore not liable to prescription in the meaning of the provisions of the *Louisiana Code*, article 3505. See 12 *Martin*, 671. *Chitty on Bills*, 45 and 6.

2. No prescription can be pleaded and sustained in this case, except the prescription of ten and twenty years, which prescription has not yet run and become complete. See *Louisiana Code*, article 3508.

Bullard, J., delivered the opinion of the court.

This action is brought upon an instrument of writing signed by the late Joseph Erwin, the ancestor of the defendants, by which he acknowledges to have received from the plaintiff, two notes signed by Abraham Wright, upon which five hundred dollars were due, for the purpose of securing the amount, if practicable, without suit, and if so secured and by him (Erwin) received, to be paid to said Jouett, or his

order, and if not so secured, the notes to be returned when called for. This paper bears date March 6, 1823. The plaintiff sues for the amount due on the notes, or for a surrender of the notes themselves, in the alternative.

The defendants pleaded a general denial, and the prescription of five years. The plea of prescription being sustained by the District Court, and the suit dismissed, the plaintiff appealed.

Article 3505 of the Louisiana Code; on which the defendants rely to sustain this prescription, declares, "that actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by endorsement or delivery, are prescribed by five years, reckoning from the day when these engagements are payable."

Even admitting, for the sake of argument, that the paper sued on, comes within the class of engagements contemplated by this article, yet the time at which the payment was to be made on the notes surrendered, is left wholly indefinite. It does not appear that five years have elapsed since a right of action accrued to the plaintiff, although the paper bears date more than ten years ago. But we consider the instrument in question, rather as evidence of a mandate, than as an obligation for the payment of money. The subscriber constitutes himself the agent of the plaintiff, to secure the payment of certain notes without suit, and he engages to account to his principal on demand; to pay him over the money, if he should receive it, and if not, to return the notes.

We are, therefore, of opinion that the court erred in sustaining the plea of prescription, but the evidence in the record does not enable us to decide upon the merits.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, the case reinstated, and the plea of prescription overruled; and it is further ordered, that the case be remanded for further proceedings according to law, and that the appellees pay the costs of the appeal.

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An instrument of writing, acknowledging the receipt of certain notes for collection, and the money to be handed over, or the notes returned when called for, does not come within that class of obligations which are prescribed in five years. No prescription runs against it, until some act is done by which a right of action accrues.

A receipt for notes to collect and pay over, or return when called for, is rather evidence of a mandate, than an obligation to pay money, in which the subscriber to the instrument of writing constitutes himself an agent, to secure and receive payment, and pay over the sum collected, &c.

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DOUGLASS ET AL.
vs.
EDWARDS ET AL.

DOUGLASS AND WIFE vs. EDWARDS AND WIFE.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF IBERVILLE.

The order or decree of a court in another state, appointing guardians to minors, for the special purpose of protecting their rights and interests in a certain suit pending in Louisiana, will not be received as evidence of a general authority to sue for and recover the property of a succession due to the minors here, and to compel the administrator to account.

But if the power granted to guardians of minors, by the decree of a court of another state, confers full authority on them, in legal form, to represent the minors in all things relating to their property here, such decree would be full evidence of authority in the guardian to act.

To compel an administrator to account for the administration of a succession, all the parties must be properly before the court, the heirs of the deceased partner properly represented, as well as the surviving partner of the community.

An executor or administrator ought not to be compelled to render two separate accounts relating to a single succession.

This is an action instituted by the surviving widow of Henry Crabb, deceased, in her own right, and as guardian of her minor children, assisted by her present husband, also guardian of these minors, all residing in the state of Tennessee, against the defendants to recover certain property, and compel the rendition of an administrator's account of an estate in Louisiana. The plaintiffs allege that when Henry Crabb, who resided in Tennessee, died, he left a large property in Louisiana; that one David Barrow, qualified as testamentary executor in this state, and during his administration received upwards of forty thousand dollars of this property, and died without rendering an account; that there is still a balance of ten thousand dollars due from his estate by those who represent it.

They further allege, that Barrow left a surviving widow and minor child, and that she has intermarried with W. E. Edwards, who have taken possession of the estate of the former. They pray that Edwards and wife be compelled to account, and pay over the amount claimed as still due from Barrow, on account of his administration.

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The defendants denied the right of the plaintiffs to claim the succession of Crabb, and that they had not presented themselves with the necessary legal powers and forms to require an account of the administration of Barrow, and to reclaim the succession. They denied the heirship of the minors Crabb, or that they were legally and properly represented; also, that Mrs. Douglass, formerly wife of Henry Crabb, deceased, never qualified as guardian, was not authorized by any tribunal to represent the minors, or institute suit in their behalf, and to compel the defendants to account for Barrow's administration. They pray that the plaintiffs' demand be rejected, &c.

Upon these pleadings the parties went to trial.

The plaintiffs offered in evidence, in support of their right to maintain this suit and recover, a decree of the county court of Davidson county, in the state of Tennessee, stating, "that the court appointed Harry L. Douglass and Jane A. Douglass, his wife, special guardians of Henry Crabb, Mary Crabb and Jane Anne Crabb, minor orphans of Henry Crabb, deceased, to attend to their interest in a suit depending in Louisiana, wherein the widow and heirs of Henry Crabb, deceased, are plaintiffs, and against David Barrow, executor or administrator, defendant; whereupon the said Harry L. Douglass, and Jane A. Douglass, in court here, have given three several bonds, &c., as security for their faithful guardianship."

This decree, or order, is attested by the clerk of the county court, who is certified to be clerk by the presiding magistrate, and the governor certifies that the magistrate is duly commissioned as such.

The judge of probates was of opinion that this document, or order, of the county court of Tennessee, *was not sufficient*

EASTERN DIST. to authorise the plaintiffs to maintain their suit. Judgment
March, 1836. of non-suit was entered against the plaintiffs, from which
 DOUGLASS ET AL. they appealed.

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A. N. Ogden, for the plaintiffs.

1. Insisted that the decree, or judgment of the court in Tennessee, clothed them with full and sufficient authority to maintain this suit, and to recover the amount of the estate of Crabb, remaining in the hands of his administrator.

Labauve and Stacy, for the defendants.

1. The decree or pretended judgment of the Tennessee court, under which the plaintiffs claim authority to act as guardians of the minors, is without the signature of the judge or court. There is no evidence that the Tennessee laws are different from our own, requiring the signature of the judge. This document should be rejected on that ground.

2. A *special* appointment and authorisation, as tutor, curator, guardian, or the like, for the purpose of carrying on a suit *as plaintiff*, is not known or authorised by our law. The law allows of a special appointment to minors, only when they are to be made defendants. *Louisiana Code, article 295.* It is not shown that the laws of Tennessee authorise such appointments for the purpose of prosecuting suits.

3. The appointment purports specially to authorise the plaintiffs as special guardians of the minor orphans of Henry Crabb, deceased, to attend to their interest in a suit depending in Louisiana, wherein the *widow and heirs of Henry Crabb, deceased*, are plaintiffs, against *David Barrow*, executor, defendant. The appointment being made for a special purpose, can avail only in the suit named in it; *now, no such suit exists*; the present is different, both as to parties, plaintiffs and defendants, and consequently is not the one for which the appointment was made. The parties to the present suit, are Henry L. Douglass and Jane Anne Douglass, his wife, plaintiffs, *vs.* William E. Edwards and Lavina W. Edwards,

his wife, tutrix and co-tutor of David Barrow, a minor, defendants. As well might the document filed, authorise the parties therein named to prosecute any other suit. Neither the parish or court in which said suit was pending, is set forth.

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Mathews, J., delivered the opinion of the court.

This suit is brought by Douglass and his wife, as guardians or tutors of the minor children of Henry Crabb, deceased, formerly the husband of Mrs. Douglass, against the defendants, as representing the estate of David Barrow, deceased, in their capacity of tutor and tutrix of a minor child of said Barrow and Mrs. Edwards, the latter being his wife during his lifetime. Exceptions to the rights and authority of the plaintiffs to maintain the present action, are found in the answer of the defendants. Amongst these exceptions is one, denying the character (assumed by them in their petition) as tutor and tutrix, &c. The court below sustained this plea, and gave judgment of non-suit, from which the plaintiffs appealed.

They appear to be absentees, in other words as having no domicil or residence in this state. The suit is brought for the purpose of compelling the defendants to render an account of the administration of D. Barrow, who acted as executor of the last will and testament of Henry Crabb, and to obtain a judgment for the balance of the succession of the latter, which remained in the hands of the former at his death. The evidence offered in support of the plaintiffs' right to claim the account and judgment as prayed for in their petition, is an order or decree of the Court of Pleas and Quarter Sessions of Davidson county, in the state of Tennessee, by which they are appointed guardians of the interests of the minors of H. Crabb, deceased, for a special purpose, viz: to protect the rights of said minors, in a suit depending in Louisiana, wherein the widow and heirs of H. Crabb, deceased, are plaintiffs, against David Barrow, &c. Now as the present defendants represent, or are supposed to represent Barrow, and the suit being in substance, though

The order or decree of a court in another state, appointing guardians to minors, for the special purpose of protecting their rights and interests in a certain suit pending in Louisiana, will not be received as evidence of a general authority to sue for and recover the property of a succession, due to the minors here, and to compel the administrator to account.

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But if the power granted to guardians of minors, by the decree of a court of another state, confers full authority on them, in legal form, to represent the minors in all things relating to their property here, such decree would be full evidence of authority in the guardians to act.

not in name, the one referred to in the decree of the court of Davidson county, perhaps the mistake of names would not invalidate the power granted by the decree of that court, if it conferred full authority, given in legal form, to the plaintiffs, to represent the minor children of Crabb, in all things relating to his succession, as tutors, clothed with full power and authority allowable to them in such capacity. But this is not the case in the present instance; they are nominated for a special purpose, and by what power legally vested in the court which appointed them to office, we do not know. The circumstances in the present case, do not bring it under the rules as laid down in that of *Berluchaux vs. Berluchaux et al.*, as reported in 7 *Louisiana Reports*, 539 and 545. See also the case of *Chiapella vs. Coupray*, 8 *Louisiana Reports*, 84. In those cases we held, that a tutor or guardian, legally appointed to a minor, according to the rules and forms of a foreign state or government, could reduce to possession the property of the minor, situated in this state, by appointing an attorney for that purpose, and do all things here appertaining to the interests of the pupil, as if the tutor had received his appointment in pursuance of our laws, distinguishing the office of tutors or guardians from that of executors and other administrators of successions. From these last, it seems to us difficult to distinguish an administrator, appointed under whatsoever name or title, for a special and particular purpose, in relation to a succession. Such administrator, although denominated a tutor, does not possess the general and imposing power and authority conferred on tutors, appointed to protect the persons and property of their pupils, in every thing relating to their comfortable existence and education, and pecuniary interests. If an affirmation of the judgment had a tendency, finally to defeat any just claims of the plaintiffs, we would be very reluctant to sanction it. The only inconvenience occasioned by the non-suit, is delay, leaving the parties claiming rights, to pursue them in a legal manner, not hard to be discovered. One of the plaintiffs, the late widow of Crabb, claims in her own right, one half the sum which may be owing by the succession of Barrow,

belonging to her as a part of the matrimonial acquests and gains, acquired during her marriage with her first husband, and the counsel for the plaintiffs contends, that in this respect she ought not to have been non-suited. We cannot consent to this proposition. The action is instituted to compel an account and settlement of the administration of Crabb's executor; it relates to the management of the succession of the former, and although it may be blended with the rights and claims of the surviving partner, of acquests and gains, the division and separation of these rights and claims can only regularly take place, after liquidation and settlement of the whole estate, as left at the death of the husband. The executor or his representatives, ought not to be compelled to render two accounts, relating to a single administration.

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To compel an administrator to account for the administration of a succession, all the parties must be properly before the court; the heirs of the deceased partner properly represented, as well as the surviving partner of the community.

An executor or administrator ought not to be compelled to render two separate accounts, relating to a single succession.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

RIORDON vs. DAVIS.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE OF THE SECOND PRESIDING.

A witness may refer to a memorandum to refresh his memory relating to the facts he is called to testify about. It is not required that the memorandum be cotemporary with the facts. It suffices that it was made by the witness, or another with his privity, when the facts were fresh in his recollection, and that the reading of it restores them, when fading in his memory.

A witness will be permitted to refer to a summary of his testimony given on a former trial, touching the value of certain work which he had previously examined and approved. This is not for the purpose of reviving

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his faded recollection of the facts themselves, but to remind him of what he had sworn to on a former trial.

If a witness dies before the last trial, his testimony taken on a former trial of the same cause, is admissible in evidence.

So, the adverse party is authorised to produce the testimony of a witness taken down on the first trial, with a view of showing that it differed from his statements given on the second trial.

A witness will be allowed to refer to a report of experts, of whom he was one, which has been set aside, to refresh his memory, when the fact to be proved was, what estimate he had put on the work done, the reference being as to a memorandum deliberately made at the time.

This is an action to recover from the defendant, the sum of seven hundred and twelve dollars and thirty-five cents, being the balance of an account stated, for carpenters' work done on the houses of the latter.

The defendant admitted the plaintiff had worked on his houses, but averred his charges were exorbitant, erroneous and fraudulent; that he had been employed as a master workman, to direct and conduct his buildings in a skillful manner, but had shamefully neglected his business, so much so that he was dismissed, and other workmen employed to go on and complete the work; that he has paid the defendant one hundred and twenty-six dollars to be imputed to this demand, which is as much as he is entitled to.

Experts were appointed to examine the work done by the plaintiff, and to report thereon to court. They estimated the value of work and labor done on the defendant's buildings by the plaintiff, at five hundred and twenty-five dollars.

The report of experts was set aside, an amended answer filed, and a new trial ordered. Two carpenters estimated the value of the work done, one at five hundred and twenty-five dollars, and the other at five hundred and ninety-five dollars. The district judge took the medium value of five hundred and sixty dollars, and after deducting two hundred and six dollars for payments and credits proved, gave judgment in favor of the plaintiff for three hundred and fifty-four dollars. The defendant appealed.

The bills of exception taken in the course of the trial, are fully noticed in the opinion of the court.

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Ives, for the plaintiff.

Davis, in *propria personâ*.

Bullard, J., delivered the opinion of the court.

This suit is brought to recover the value of carpenters' work alleged to have been done for the defendant. He pleaded the general issue and some offsets; and judgment having been rendered against him, for a balance of three hundred and fifty-four dollars, he appealed.

The case appears to have been tried several times, and the record is encumbered with documents, interlocutory orders and exceptions, which we cannot notice, but shall confine ourselves to the proceedings had on the last trial, which was followed by the judgment appealed from.

The correctness of the judgment below, depends mainly on matters of fact, and the evidence in the record abundantly shows that the defendant was indebted, in some amount, for work done as alleged. The quantum depends upon estimates made by carpenters who were examined as witnesses.

The appellant has not favored us with any arguments on points of law, on which he relies for a reversal of the judgment; but there are two bills of exception in the record, which we proceed to notice.

By the first, it appears that while a witness was under examination, the plaintiffs counsel offered him a summary of his testimony, taken on a former trial, for the purpose of refreshing his recollection of what he had testified previously. This was objected to, on the ground that the estimate of the value of work, was not matter which could require or justify his reference to a memorandum to refresh his memory. The court having permitted the witness to recur to the summary of evidence, the defendant took a bill of exceptions.

It is now considered a settled rule of evidence, that a witness may refer to a memorandum in order to refresh his

A witness may refer to a memorandum to refresh his memory, relating to the facts he is called to testify about. It is not required that the memorandum be cotemporary with the facts. It suffices that it was made by the witness, or another with his privity, when the facts were fresh in his recollection, and that the reading of it restores them, when fading in his memory.

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A witness will be permitted to refer to a summary of his testimony given on a former trial, touching the value of certain work, which he had previously examined and approved. This is not for the purpose of reviving his faded recollection of the facts themselves, but to remind him of what he had sworn to on a former trial.

If a witness dies before the last trial, his testimony taken on a former trial of the same cause, is admissible in evidence.

So, the adverse party is authorised to produce the testimony of a witness taken down on the first trial, with a view of showing that it differed from his statements given on the second trial.

A witness will be allowed to refer to a report of experts, of whom he was one, which has been set aside, to refresh his memory, when the fact to be proved was, what estimate he had put on the

memory of facts. The rule, according to the authority of Starkie, does not require that the memorandum should be cotemporary with the facts; it suffices that it was made by the witness, or another with his privity, when the facts were fresh in the recollection of the witness, and that the reading of the memorandum restores the recollection of the fact which had faded in his memory. 1 Starkie, 128, 129.

But in this case, the witness was permitted to refer to his former testimony, given when the facts themselves were more fresh in his mind, not directly for the purpose of reviving his faded recollection of the facts themselves, but to remind him of what he had sworn to on a former trial, touching the value of certain work which he had previously examined and appraised. If the witness had died previously to the last trial, his testimony taken on a former trial, would have been admissible. It is clear, also, that when the same witness testifies on a second trial, the adverse party would be authorised to produce his first testimony, with a view of showing that it differed from his statements given on the second trial. Every witness is presumed to have sworn to the truth, until the contrary be shown, and is at liberty to correct his statements during the progress of the trial. We see no impropriety, therefore, in a witness referring to his statements on oath made on a former trial, with a view indirectly of reviving his recollection of facts within his knowledge.

The second bill of exception shows that another witness was permitted to refer to an estimate of the work, made by him and another person, which had been reduced to writing at the time, in order to enable him to refresh his memory. He was permitted to refer to the paper for that purpose, the judge observing that his evidence would be good, if he could afterwards depose from recollection, and not from the memorandum alone. It appears by the record, that the witness had been appointed one of two experts to examine and value the work done, but their report had been set aside. The fact to be proved, was what estimate he had put upon the work done. The report might well, in our opinion, be referred

to by the witness as a memorandum deliberately made at the time. EASTERN DIST.
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A careful examination of the evidence in the record, does not enable us to say that injustice has been done to the defendant.

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work done, the reference being as to a memorandum deliberately made at the time.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

ADAMS vs. HURST.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The wife can obtain a divorce, *a vinculo matrimonii*, from her husband, when it is in proof that he has lived in open adultery with another woman, and there is no evidence, at the institution of suit, that a reconciliation has taken place.

The statute of 1827, relative to divorces, authorizes a divorce, on the part of the wife, when the husband keeps a concubine in the common dwelling, or keeps her publicly in any other house. It is also held, that living with her, at *her own house*, is within the meaning of the law.

This is an action of divorce, *a vinculo matrimonii*. The plaintiff alleges she was lawfully married to the defendant, in North Carolina, in 1812, and that he had left her and came to Louisiana to reside. She further states, that about a year before bringing suit, she also came to this state, in the hope that he would take her to his bed and board again; but that she found him living in open and avowed adultery with another woman, and that he has continued to live so until within three weeks before suit. She prays for a divorce from the bands of matrimony.

The defendant admitted the marriage, but denied the other allegations of the petitioner.

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Upon these pleadings the cause was submitted to the court. There was abundant testimony in support of the facts alleged.

The district judge decided that the evidence did not show that the defendant was living in a state of concubinage, at the commencement of the suit, or the time of trial; he, therefore gave judgment for the defendant. The plaintiff appealed.

Deblieux, for the plaintiff.

Shepard and Buchanan, contra.

Mathews, J., delivered the opinion of the court.

This is a suit brought by a wife against her husband, to obtain a divorce, *a vinculo matrimonii*. The improper conduct charged against the defendant is abandonment of the plaintiff, and living in open concubinage and adultery with another woman. Judgment was rendered in the court below in favor of the defendant, from which the plaintiff appealed.

The record affords no positive evidence of the length of time during which the wife was abandoned by her husband. There is ample proof, however, that he has lived in concubinage and open adultery with a free woman of color, named Rose Metoyer, and that he thus lived a considerable length of time, making the house of his concubine his home. It is true, as assumed by the judge, *a quo*, in deciding the case, that no testimony was adduced to show that the defendant was thus living in open adultery at the period when the present suit was commenced; nor is it shown that any reconciliation had taken place between the parties at any time after their long separation. This proof ought to have been offered on the part of the defendant, if he intended to avail himself of the exceptions recognised by the act of 1827, on the subject of divorces. A just decision of the case depends on a proper interpretation of this law.

By the first section, it is enacted that adultery on the part of the husband is a good cause for a divorce claimed by the

wife, when he has kept a concubine in the house of their common residence, or when he has kept one publicly and openly in any other house; and such conduct on the part of the husband affords good grounds to the wife to claim a divorce, unless subsequent to it a reconciliation may have taken place between the parties. How an action of this kind may be barred, is shown by the articles 149 and 150 of the *Louisiana Code*. But, in the present case, the record contains no evidence to support an exception to the action.

The testimony shows clearly, that the defendant did live in a state of open concubinage and adultery with Rose Metoyer. He has, therefore, in the terms of the law, lived in this state; and although he did not keep his concubine in the common dwelling of himself and wife, he certainly kept her, openly, in another house; and it does not, in our opinion, in any manner change the true spirit and meaning of the law, that the place of keeping her was the house of his concubine, for the circumstance of her having housed and fed him does not change the nature of the offence, although it may render the offender more degraded and despicable in the opinion of the orderly and virtuous part of the community. Adultery is a direct and immediate cause for divorce from the bonds of matrimony, according to the fourth section of the act of the legislature above cited; and it appears to us that the testimony fully proves the offence in the present instance, in terms of the law, as charged against the defendant.

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The wife can obtain a divorce *a vinculo matrimonii* from her husband, when it is in proof he has lived in open adultery with another woman, and there is no evidence at the institution of suit that a reconciliation has taken place.

The statute of 1827, relative to divorces, authorises a divorce on the part of the wife, when the husband keeps a concubine in the common dwelling, or keeps her publicly in any other house. It is also held, that living with her at her own house, is within the meaning of the law.

It is, therefore, ordered, adjudged and decreed; that the judgment of the District Court be reversed and annulled. And, proceeding here to give such judgment as, in our opinion, ought to have been given in the court below, it is further ordered, adjudged and decreed, that the bonds of matrimony heretofore existing between the plaintiff and her husband be dissolved, and that she be, and is hereby, divorced from her said husband, and that he pay costs in both courts.

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LANDRY vs. GAMET.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

The record and judgment of a suit against the plaintiff by a mortgage creditor, under which a tract of land, sold by the former to the defendant, was seized and sold, is admissible in evidence in an action for the price, under the plea of eviction.

This is an action to recover the price of a tract of land, sold by the plaintiff to the defendant, and to settle and liquidate a partnership account between the parties.

The defendant, among other pleas, alleged in his defence, that he had been evicted by a seizure and sale of the land he purchased from the plaintiff, under an execution of a mortgage creditor of the latter, and offered in evidence the record of the proceedings, in which the judgment was obtained under which he was evicted. It was objected to, and the court rejected it on the ground that it was inadmissible. A bill of exceptions was taken.

As the whole case turns on the rejection of the defendant's evidence, under the first branch of the defence, it is unnecessary to state more of the case than what is contained in the opinion of the court.

The plaintiff had judgment in the court below, from which the defendant appealed.

Edwards and *Davis*, for the plaintiff, contended :

1. That the record and judgment of the Probate Court against the plaintiff, offered in evidence by the defendant, was properly rejected.

2. It was inadmissible, because it went to establish facts not alleged in the pleadings.

3. Because, if received, it would be in direct contradiction to the pleadings.

4. It was not the proper legal evidence to establish the facts sought to be proved. The defendant alleged in his answer, that the plaintiff was *tutor* of Brasset, who obtained the judgment against him which is offered in evidence. The fact is, the plaintiff was curator *ad bona*. To admit the evidence, would be allowing the party to allege one capacity and prove another.

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Labauve and *Stacy*, for the defendant, urged :

1. That the record of the proceedings in the Probate Court against the plaintiff, was admissible in evidence, and should have been received, as showing that judgment had been obtained against him as curator *ad bona*, for one thousand five hundred dollars, decreeing a mortgage upon the very land he sold to the defendant, the price of which is claimed in the petition, and that the defendant was evicted by the seizure and sale of the land by the sheriff, under this judgment.

2. This evidence having been rejected, the cause should, on this ground, be remanded for a new trial, and the document admitted in proof of the defendant's allegation of eviction.

Mathews, J., delivered the opinion of the court.

In this case, certain sums of money and interest thereon are claimed by the plaintiff on various contracts of sale of property, entered into between him and the defendant. Judgment was rendered in the court below in favor of the former, for the sum of six thousand two hundred and fifty dollars, with interest, &c.; from which the latter appealed.

This action is complicated, in consequence of the different characters in which the plaintiff sues, and the double capacity in which the defendant is sued, and is much confused by complexity consequent on the variety of contracts involved in its investigation.

The suit is brought by the plaintiff in his own right, and as tutor to his minor children now living, and as heir to one of them deceased ; and the defendant is sued personally and

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as tutor to his minor children. These capacities do not appear to have been contested in the court below, and, consequently need not be here examined. The complexity of the action, and we may add its perplexity, will be best shown by stating the various contracts on which it is founded. In 1829, the plaintiff sold to the defendant one undivided half of a tract of land, fronting on the Mississippi, of five arpents front, with the ordinary depth, for the price of three thousand five hundred dollars, payable by instalments, with interest, &c. Soon after this sale, the parties entered into a partnership for the purpose of cultivating the whole tract of five arpents front, with the ordinary depth of forty, as a sugar plantation. On the 10th of February, 1830, this partnership was dissolved, by mutual consent of the parties, and the property of the concern ordered to be sold, for the purpose of liquidating and settling its accounts. A sale, at auction, took place, in pursuance of the agreement, and the defendant became the purchaser of the whole tract, for the sum and price of nine thousand dollars, one half of which, together with the three thousand five hundred dollars, is claimed in the present suit.

These claims are opposed by the defendant, in his answer, on several grounds. 1st. That he was evicted, in due course of law, from the land sold him by the plaintiff, in consequence of a legal or tacit mortgage with which the property was encumbered, by acts of the plaintiff, before the sales as above stated. 2d. That, as the last sale was made expressly to enable the partners to liquidate and settle the accounts of the partnership, no recovery can be had against him on that account until such liquidation shall take place, and offers to have it made in the present suit, by a plea, in the nature of a reconvention.

In support of the first means of defence, the defendant offered in evidence the record of proceedings in the Court of Probates, by which it appears that one Alexis Brasset recovered a judgment for one thousand five hundred dollars against the plaintiff, which was executed by seizing and selling the tract of land of five arpents front, &c., in the

possession of the defendant, to whom it was adjudicated by the sheriff, at the price of one thousand six hundred dollars. The tract appears to be the same previously bought by Gamet at the sale of the partnership property. This document of evidence was rejected by the court below, and a bill of exceptions taken to its opinion, &c. The judge *a quo* gives no reason for its rejection, except that it was inadmissible. Now, we cannot imagine reasons against its admissibility. It is true it may not, when examined, amount to a legal eviction of the defendant; but it certainly proves that there was a judgment against the plaintiff; that the land previously sold by him to the defendant was seized and sold; and that the latter became the purchaser, at sheriff's sale, for the sum of one thousand six hundred dollars, which it seems, by a receipt found on the record, he has since paid to Alexis Brasset. The document offered was certainly competent and admissible evidence to prove *res ipsas*. What effect it may legally have on the claims and rights of the parties to this suit, will be a proper subject of inquiry after it shall have been received in evidence. We think the judge below erred in rejecting it. There is another bill of exceptions to the opinion of the judge *a quo*, by which he refused to allow the defendant to file an amendment to his answer, on the ground that it was offered too late. Perhaps it was not offered in proper time; but on this matter we forbear to give any opinion, as the pleadings, without this amendment, were sufficient to authorise the admission of the record of the proceedings had in the Court of Probates, in which Alexis Brasset was plaintiff against Auguste Landry, the present plaintiff. In consequence of the rejection of this testimony, the cause must be remanded for a new trial; and on the next trial, it appears to us, the whole matters in dispute between the parties may be settled, both in relation to the claim founded on the first contract of sale, and that for the liquidation of the partnership, as urged by the defendant in his answer.

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The record and judgment of a suit against the plaintiff, by a mortgage creditor, under which a tract of land, sold by the former to the defendant, was seized and sold, is admissible in evidence in an action for the price, under the plea of eviction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and

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annulled, and that the cause be sent back to said court, to be tried *de novo*, with instructions to the judge not to reject the record of the suit in the Court of Probates of Alexis Brasset vs. Auguste Landry, offered in evidence by the defendant; and it is further ordered, that the appellee pay the costs of this appeal.

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APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

A promise made by a party, to indemnify and save harmless a person who, at his request, sleeps at and guards his store of nights, is *binding*, and will authorise a jury to give damages sufficient to pay the expenses of a criminal prosecution incurred by this person, in consequence of his acceding to such promise.

This is an action in which the plaintiff claims the sum of five hundred dollars, as a compensation and indemnity for sleeping in, and guarding, the defendant's store.

The petitioner alleges that in 1829, he agreed to sleep in the defendants store for its safety and protection, which was at a great distance from his residence; and for his security and the responsibility imposed on him, the defendant agreed to save him harmless against any accident that might befall him. He further alleges, that on the night of the 29th December, 1829, an accident occurred, whilst in the discharge of his duty in guarding the store, by which he was subjected to a criminal prosecution for murder; that the plaintiff again promised to pay all the costs and expenses he would be subjected to on this account, and that accordingly, he expended five hundred dollars for lawyers' fees, for which he prays judgment against the defendant.

The defendant excepted that the petition contained no cause of action on its face; that it is vague, uncertain and obscure in its allegations, and that the injury charged as resulting to the plaintiff, appears by his own statement to have been the result of accident and misfortune, &c., for which the defendant is in no way responsible. He prays to be dismissed with his costs.

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The cause was submitted to a jury on this issue, who, upon hearing the testimony, returned a verdict for the plaintiff of five hundred dollars. After overruling a motion for a new trial, judgment was rendered in conformity with the verdict. The defendant appealed.

Labauve and *Stacy*, for the plaintiff, stated, this case turned altogether on matters of fact, of which the jury were the rightful judges.

Hiriart and *Burk*, for appellant.

Martin, J., delivered the opinion of the court.

In this case the plaintiff charges in his petition, that being in the employment of the defendant to do certain carpenter's work, and the latter being a merchant, had his store at a great distance from his dwelling house, and it being much exposed to depredations, he prevailed on the petitioner to go and sleep there of nights, for the protection and security of the house and its contents; that he did so, as requested, for a while without stipulating for any compensation; but afterwards, the defendant agreed to keep, and save him harmless from any accidents or consequences injurious to himself, resulting from his responsible and exposed situation. He further states, that a murder, or homicide, was committed in the house while he continued his nightly watches, for which he was arrested and imprisoned on suspicion, from his peculiar situation; that the defendant repeated his former promises to indemnify and save him harmless from loss and injury, the consequence of complying with the defendant's repeated requests. The plaintiff further charges, that he was put to

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A promise made by a party to indemnify and save harmless a person, who at his request sleeps at and guards his store of nights, is binding, and will authorise a jury to give damages, sufficient to pay the expenses of a criminal prosecution incurred by this person, in consequence of his acceding to such promise.

great cost and expense to defend himself, and obtain his liberty, for which he seeks indemnity from the defendant.

On the trial before the jury, the plaintiff obtained a verdict of five hundred dollars against the defendant. From judgment rendered thereon, the latter appealed.

It is clear that the promise made by the defendant, of an indemnification to the plaintiff, before he was apprised of the unfortunate and distressed situation in which the latter was placed, in consequence of his compliance with the request of the former, is binding on him. The damages, however, awarded to the plaintiff have appeared to this court as high. But there is evidence in the record, that the sum thus allowed, was actually paid by the plaintiff to his lawyer for defending him against the criminal charge, against which he was indemnified. The jury have considered that he was entitled to recover this sum from the defendant, and their award, in this matter, must stand.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

MILNE vs. PONTCHARTRAIN RAIL ROAD COMPANY.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

When the charge of the inferior court is pertinent to the issue, and the law is correctly stated, it is no solid objection thereto, that it might have been misunderstood by the jury, and had a tendency to mislead them.

The party possesses the right, who is apprehensive the charge of the judge has been misunderstood by the jury, to apply to the court for a clearer exposition of his meaning.

This is an action for damages, and for the removal of incumbrances and nuisances, against the defendants as a corporate body. EASTERN DIST.
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The petitioner alleges he ceded and granted, in full right and title, to the defendants, on *certain specified conditions*, one hundred and fifty feet in width through his land, bordering on lake Pontchartrain, for the passage and termination of the rail road at said lake, to extend from his southern boundary, where the road enters it, to the *low water mark*. That, by the fifth and sixth conditions of said grant, the defendants were bound not to appropriate this land to any other use than the construction and carrying on of the rail road, and especially not to erect or build thereon any wholesale or retail stores, shops or taverns, or to rent and receive revenues therefrom.

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The petitioner further alleges that the said rail road company has violated said conditions, by erecting houses and receiving revenues, and greatly injured and depreciated the value of his other property adjacent thereto, to his damage forty thousand dollars. That they have done further injury to his property, by digging ditches and drains on the streets in front, on each side of the road, and which they have refused to close or fill up, although requested by him to do so; and have caused still further damage to him, by erecting houses, workshops, and other incumbrances on the streets in front of his lots, &c., to his further damage ten thousand dollars. He prays judgment for his damages, and for general relief, &c.

The defendants pleaded a general denial, and the prescription of one year.

The deed of grant from Alexander Milne to the rail road company, of the 18th August, 1829, and which was confirmed to said company after it was chartered, the 20th April, 1830, contains the following clauses:

“That he grants and transfers to the company, in consideration of the benefits he expects to derive from the passage of the road over his land, under the conditions and restrictions hereinafter expressed, whatever part of his said

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lands it may be deemed advisable to locate, as may be comprehended and embraced in a breadth of one hundred and fifty feet, to extend from a point in his southern boundary, where the road shall enter, *and to continue to the low water side of said lake, and further to extend so far into said lake as may be required.* And it is expressly agreed by and between the said parties, that the foregoing grant, transfer and conveyance is made on condition: 1. That if the said road is not commenced within three years, and completed within five, this grant to be void. 2. That the land granted shall revert to the donor. 3. In case the road is not constructed within the time, or this agreement become void, the improvements, as far as made, shall be the property of the donor. 4. The company not to alienate the granted premises. 5. That the land thus granted shall not be used or appropriated to any other purpose than for the construction and carrying on the rail road. 6. That no part of this land, or buildings erected thereon, shall be used for the purpose of wholesale or retail stores, shops or taverns, nor rented to raise revenues or rents in any manner whatever. But the company is to have the privilege of constructing all necessary buildings for the use of the road, and to raise and make the road the proper level, and to repair the same, &c."

A plan of the town of Milneburg, which the plaintiff laid out at the lake, on both sides of the rail road, showing his lots and the situation of his property, was produced in evidence.

The plaintiff introduced witnesses who testified that the company built houses and dug ditches in the streets of the town laid out by him at the end of the rail road running into the lake. That these houses were in front of the lots of several proprietors who purchased from the plaintiff; and in consequence thereof, some of them were obliged to abandon the property, and refused payment. That the ditches were kept in a filthy state, and were a great nuisance.

It was also in proof, that the company had erected a hotel and other houses on the pier which they built into the lake, for which they were receiving rents and revenues. That the

Washington Hotel is built inside and near the low water mark of the lake.

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The evidence also showed that the plaintiff had notified the company to remove the buildings and obstructions they had put on the streets along side the road, and to fill up the ditches thereon, which they failed to do. That he urged the company to have the houses pulled down which were situated in front of his property, and made propositions to remove them out of his front to another part of his property, where they might use them, which was refused.

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At the close of the trial, when the cause was about to be submitted to the jury, the parish judge charged them on certain points as asked, and added, that "if the act of donation from the plaintiff to the defendants contains, on the part of the plaintiff, the assumption of certain rights which he did not actually possess, nevertheless, the receiving the donation by the defendants was an acknowledgment of those rights, and they are bound by the obligation they entered into under such acknowledgment."

"The donor has the right to affix conditions to the donation, and the donee, by accepting the donation, contracts the obligation of complying with the conditions."

This part of the charge was excepted to by the defendants.

The jury returned a verdict of five hundred dollars for the plaintiff, upon which judgment was rendered. The defendants appealed.

Preston, for the plaintiff, contended, that the instructions and charge of the judge to the jury were in accordance with law, and correct.

2. That the verdict of the jury was fully supported by the evidence in the record.

Peirce, contra.

1. The charge of the judge is contrary to law.

2. The verdict of the jury is contrary to both the law and evidence.

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Eustis, on the same side, urged the following points :

1. The object of this suit is to reach the arch hotel built by the company on their wharf extending in the lake. To this point the evidence was mainly directed. There was a clause in the grant from Milne, that the rights of the company should extend so far into the lake as might be required ; and he contends that the inhibition to build taverns not only extended to the *land granted*, but to the land which the company might hereafter make in front of it in the lake. The plaintiff did not choose to meet this question singly, but grouped two other causes of action with it, and had a general verdict of five hundred dollars upon all.

2. The hypothesis assumed, in the charge of the judge, that the “act of donation contained the assumption of rights which the donor did not possess,” is contrary to the fact, for the donation contains nothing like it. The defendants never acknowledged these rights ; the conditions and the acceptance were confined to *the land granted*.

3. The terms of the grant must be construed in favor of the defendants ; all limitations of estates or rights of property must be construed strictly.

4. In doubt, the construction is to be against the *stipulant* and in favor of the party *obligé*.

5. The space in the lake was not *the land granted*. The space granted was not to be extended into the lake, but only part of it, sufficient for tracks of the rail road.

6. The intention of the parties is evident. How could a road, extending one third of a mile into the lake, for the purpose of transporting passengers and freight, be made and used without affording accommodation for travellers.

7. The hypothesis of the judge was erroneously assumed. He is prohibited from touching facts in his charge, and cannot be allowed to state an hypothesis founded in law erroneously ; that is, assume one which is false, and yet, if he state the law abstractly correct, it shall be deemed no error.

8. If the hypothesis be of fact, the judge has no right to state it, except for the purpose of illustrating matters of law ;

and if it be of law, it is equally fatal. The judge, therefore, erred in assuming an abstract question of law. His charge was calculated to mislead the jury.

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Martin, J., delivered the opinion of the court.

In this case, the defendants are appellants from a judgment by which damages were recovered from them, for the breach of the conditions under which they accepted a certain donation of land from the plaintiff, and for certain alleged trespasses committed on the land of the plaintiff, contiguous to that which was the object of donation.

The only point submitted to this court by the appellants, arises out of a part of the charge of the parish judge, in which the jury were instructed, that if the act of donation contained the assumption of rights which the donor did not actually possess, the defendants were nevertheless bound by obligations entered into by them, under the acknowledgment of these rights; that the donor might annex to the donation any condition he saw fit; and the donees, by their acceptance of the donation with these conditions, were bound by the obligations which flowed from them.

The only objection made to this part of the charge is, that it had a tendency to mislead the jury.

It appears to the court, that when the charge of the inferior court is pertinent to the issue, and the law is correctly stated, it is no solid objection thereto that it may be misunderstood by the jury and have a tendency to mislead them. We do not mean to be understood as denying the right to any party, who is apprehensive of the charge to the jury being misunderstood by them, to apply to the court giving the charge for a clearer exposition of its meaning.

When the charge of the inferior court is pertinent to the issue, and the law is correctly stated, it is no solid objection thereto, that it might have been misunderstood by the jury, and had a tendency to mislead them.

It is not denied, in this case, that the part of the charge of the court *a qua*, excepted to, was pertinent to the issue; neither is it urged that it does not state the law correctly. On this view of the matter, we cannot disturb the verdict of the jury.

The party possesses the right, who is apprehensive the charge of the judge has been misunderstood by the jury, to apply to the court for a clearer exposition of its meaning.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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BALLARD vs. MERCHANTS' INSURANCE COMPANY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where cotton is shipped by the agent of the plaintiff, and consigned to J. L., who receives a bill of lading, and about the same time is directed by the agent to *turn over* the cotton to R. B. & Co., the commission merchants of the plaintiff, and in the meantime the cotton is lost by the perils of the river: *Held*, that having been consigned to J. L. by the shipment, it was protected by his open policy taken out of the office of the defendants *for whom it might concern*, making insurance on all cotton in bales shipped, or to be shipped, to the consignment of J. L.

It is not of the essence of a consignment that the consignee shall sell or dispose of the property. It is enough if he has a right to receive it, of which the bill of lading is evidence, even if he is directed to deliver it over to another agent to sell for the owner.

When an open policy of insurance once attaches to property consigned, the consignee becomes the agent of the shipper, and can do no act to deprive the latter of the right to sue in his own name on the policy.

This is an action in which the plaintiff claims indemnity for seven bales of cotton shipped from Alexandria, on Red River, and consigned to John Linton, in New-Orleans, and lost by the perils of the river, but protected by an open policy of insurance, taken out of the office of the defendants by the consignee. The defendants pleaded the general issue. They admitted the execution of the policy, but averred that all claim to loss on the part of the plaintiff had been waived and abandoned by John Linton, in whose name the policy was made, who had settled and liquidated all claims arising under it; that property to the full amount covered by the policy, had been declared by said Linton to these respondents as included in it, without including that claimed by the plaintiff.

The facts in evidence show, that in October, 1833, James Norment shipped seven bales of cotton, belonging to Dr. B. Ballard, on board the steamer Paul Clifford, consigned in a

bill of lading to John Linton, of New-Orleans. The boat and cargo were lost on the way down, by the perils of the river.

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John Linton had taken out an open policy of insurance from the Merchants' Insurance Company, *on account of whom it might concern*, embracing property shipped on board steam boats not condemned, and *consigned* to him in New-Orleans.

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Norment, witness for plaintiff, and who made the shipment, testifies that he shipped the cotton in question without any order from Dr. Ballard at that time, and his reason was that cotton at that time bore a high price, and he wished his friend to avail himself of the prices then paid for cotton; that at the time he made the shipment, he was under the impression, that John Linton was the commission merchant of Dr. Ballard, and filled up the bill of lading accordingly; but a short time afterwards, having been informed of his error, he wrote to Mr. Linton, believing he had received the cotton, to turn it over to the house of Reynolds, Byrne & Co., supposing they would refund all charges on said cotton to Mr. Linton; he directed them to receive the cotton, with no other instructions, than to receive it on account of Dr. Ballard, saying nothing about insurance, believing it would receive the benefit of Mr. Linton's policy, who, if he had received it, witness expected would have charged the cotton with premium of insurance, freight, &c., as it was consigned to him.

Thompson, witness for plaintiff, and clerk to Linton, says, he was in the habit of presenting bills of lading of property received by the house of John Linton, to the insurance offices, where it was insured, and presented it in this case; that he told Mr. Morgan, the president of the Merchants' Insurance Company, that he believed the seven bales marked *Ballard*, were not intended for Mr. Linton, but for the house of Reynolds, Byrne & Co., having been shipped in the absence of the plaintiff; that Mr. Linton was not the usual agent of the plaintiff, nor was Mr. Norment the agent of Mr. Linton, who made the shipment for the plaintiff; but that the cotton in question was shipped by Mr. Norment to Mr. Linton, supposing he was Dr. Ballard's merchant, and on discovering

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that Reynolds, Byrne & Co. were his merchants, wrote immediately to Mr. Linton, stating that the cotton was intended for Reynolds, Byrne & Co. On mentioning these circumstances to Mr. Morgan, the president of the company, he struck the plaintiff's name from the statement witness handed him for settlement, and gave no other reason than what had been stated to him, that the cotton was not intended for Mr. Linton. Witness further states, that the policy was then filled up by Mr. Linton, without reference to the seven bales of plaintiff; that if the steam-boat had arrived safe with the cotton, he would not have reported it to the insurance office, as forming part covered by the open policy of insurance, on which a premium was to be charged, *although some persons here would have done otherwise*; that Mr. Linton has sometimes refused to pay bills for insurance on cotton sent to other houses here, by mistake, and has credited the insurance company for the premium, on the cotton being covered by his open policy.

Witness further states, that Mr. Linton did not intend to abandon any rights which he might have acquired under the policy in question. The account of the loss of the Paul Clifford, arrived about the same time that the letter countermanding the shipment was received by the house of Mr. Linton.

Dupuy, witness and secretary to the Merchants' Insurance Company, says, in all cases of settlement with Mr. Linton, they paid one half of the loss on cotton insured and covered by the open policy, and were credited with one half of the premiums on cotton received by Mr. Linton and intended to be covered by this policy; never knew of an instance of a loss similar to this having been paid by any insurance company; he would not have paid it. The Louisiana State Insurance Company had an open policy with Reynolds, Byrne & Co. at the time of the shipment of this cotton.

J. K. West, witness for plaintiff, and president of the Louisiana State Insurance Company, says that the office of which he is president, would have paid a loss on cotton shipped to a house having an open policy, through mistake,

supposing them to be the merchants the of planter who owned the cotton, provided the bill of lading was made out in the name of such house. Witness considers that the cotton is covered by the open policy under the bill of lading. The house receiving the cotton by mistake would, in that case, hand it over to the house it was intended for, subject to the charge of premium and other expenses.

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Hermann, witness for plaintiff, says he is a member of the house of Reynolds, Byrne & Co.; that they frequently receive cotton shipped to them through mistake, and always hand it over to the house for which it was intended, making out an account of charges for drayage, insurance, &c., which is paid by the houses for whom the cotton was intended, crediting the insurance company with the premium. Their house has paid such charges on cotton intended for them and received by other houses, and that others have done the same thing.

The district judge who tried the cause, was of opinion that in looking to the substantial object and purpose of this contract of insurance, as embraced by the open policy of Linton, it was evident the factor wished to protect his own interests, and that of his employers; of those who sought his services in any way, &c.; that with this view of the case, judgment must be rendered for the defendants. The plaintiff appealed.

Worthington and Eustis, for plaintiff.

1. The plaintiff having proved his interest in, and the loss of, certain property shipped in the Paul Clifford to John Linton, is entitled to maintain an action on a general policy covering all property shipped to John Linton.

2. Plaintiff is not bound by any arrangement of said Linton with defendants, unless such arrangement involves an assumption of responsibility on the part of said Linton.

3. The shipment in this case was a *bona fide* shipment to John Linton, on which the defendants are responsible for losses.

4. The defendants are responsible for the entire amount, notwithstanding the policy in another company.

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J. Slidell, for the defendants.

1. The cotton, for the loss of which indemnity is claimed from the defendants, was never in fact consigned to John Linton in whose name insurance was made. It was shipped to him through mistake, by a person having no authority to make a consignment, and the error was corrected as soon discovered by revoking the shipment, and directing Linton to hand it over, if received, to the real agents of the plaintiff. The case comes within the provision of the code declaring the defects of consent, which will invalidate a contract. The error was in relation to a fact which was the principal cause of making the shipment by the agency of Linton. *Louisiana Code, articles 1813, 1815, 1817.*

2. It was not the intention of Linton to cover by his policy, merchandise shipped to him under the circumstances of this case. See testimony of Thompson and Dupuy. Consequently the policy did not attach, and he could not have recovered on it. *Phillips on Insurance, pages 57, 58, 59, 62 and 63. 2 Massachusetts Reports, 369.*

3. Linton could not have recovered, even if the policy attached, because he has not declared the loss. The policy has been filled by other risks, and the underwriters discharged. If any liability ever existed under the policy, the remedy of the plaintiff is against Linton. See testimony of Dupuy.

Bullard, J., delivered the opinion of the court.

This is an action to recover of the defendants, as underwriters, the value of seven bales of cotton, belonging to the plaintiff, which he avers were shipped by his agent, at Alexandria, on Red River, to John Linton, and were covered by an open policy of insurance, procured by Linton, for whom it might concern, of the defendants. The loss by perils of the river is not contested. In the policy it is declared, that this insurance is on cotton in bales, &c., &c., shipped, or to be shipped, to the consignment of John Linton.

The defence consists, 1st. Of a denial that the plaintiff's cotton was covered by the policy, and 2d. An allegation that if the policy ever attached, all claim for the loss alleged to

have been sustained by the plaintiff, has been waived and abandoned by John Linton, in whose name the policy was made; that property to the amount for which said policy was effected, has long since been declared to the defendants, by said Linton, as covered by the policy; that they have paid large sums of money for losses accruing under the policy to Linton, who has settled and liquidated all claims resulting from it.

The first question thus presented by the pleadings is, whether the cotton alleged to have been lost, was contemplated by the contract, and covered by the policy, or in other words, was it shipped to the consignment of John Linton.

The bill of lading shows that the captain of the steamboat Paul Clifford, took on board seven bales of cotton, shipped by James Norment, which he engages to deliver to John Linton, or his assigns, and the plaintiff, in his petition, alleges that Norment was his agent. This appears to the court, on the face of it, to be a consignment. It authorised Linton, on paying the freight, to receive the cotton, and he would have a lien on the cotton for advance of freight and other charges. Admitting that Linton had no authority to sell, or make any other disposition of the property, we do not consider it of the essence of a consignment that the consignee should have such authority. It is enough if he had a right to receive it, and of that the bill of lading is sufficient evidence. If the bill of lading had been accompanied by a letter, instructing Linton on receiving the cotton to deliver it over to another person, or to store it, or to forward it to another market, it would nevertheless have been a consignment. The letter from Norment to Linton, requesting him to turn over the cotton to another house, is not inconsistent with the original consignment. It is true, Norment may have been in error in supposing that Linton was the general factor of the plaintiff, and consequently wrote to him, not revoking the consignment, but directing in what manner he was to dispose of the cotton. Norment, who made the shipment in the absence, and without any positive orders from the owner, testifies that he would not have shipped the

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It is not of the essence of a consignment, that the consignee shall sell or dispose of the property. It is enough if he has a right to receive it, of which the bill of lading is the evidence, even if he is directed to deliver it over to another agent, to sell for the owner.

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cotton, if he had not thought it would be protected by Linton's policy; and that on discovering that he was not the commission merchant of Ballard, he wrote to Reynolds, Byrne & Co. to receive the cotton from Linton, supposing they would refund the freight and charges of insurance. The error consisted, therefore, not in the consignment, but in supposing that Linton was already authorised by the owner to sell his cotton. Norment's letter and the bill of lading arrived at or about the same time, and not until after the cotton had been lost. We are of opinion that the policy attached in favor of the plaintiff as soon as the shipment was made, as evidenced by the bill of lading.

The only remaining question is, whether Linton is shown to have done any act by which the defendants have been released from their obligation to Ballard. It appears that he presented the bill of lading of the plaintiff's cotton to the president of the insurance company, but with an intimation that probably it was intended for Reynolds, Byrne & Co. Upon this suggestion, the president struck the name of the plaintiff out of the statement handed for settlement. Other lots of cotton, lost at the same time, and shipped in the same bill of lading, were paid for, and the policy was filled by Linton without reference to these seven bales. Mr. Thompson testifies at the same time, that Mr. Linton did not intend to abandon any rights which he might have acquired under the policy. It is not pretended that, at the time those seven bales were lost, the policy had been filled by other property to the value which the defendants engaged to cover, nor that losses have been paid to the full amount insured. Ballard having a right to sue, in his own name, under a policy procured by Linton *for account of whom it may concern*, Linton must be considered in relation to him as an agent. If he had cancelled the policy, he would have rendered himself liable for the loss, and the payment of the loss to him, would have been a good and valid discharge. It does not appear that the policy was cancelled, and even as relates to Linton himself, it is by no means clear that he would not still have a right to maintain an action on it. In the case of *Russell*

When an open policy of insurance once attaches to property consigned, the consignee becomes the agent of the shipper, and can do no act to deprive the latter of the right to sue in his own name, on the policy.

vs. *Bangley*, chief justice *Abbott* said, "the general rule of law is, that if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving the money, writes off money due from him to the debtor, then the latter is not discharged. In cases of insurance, usage may possibly introduce a different rule, but at all events, an underwriter has never been considered as discharged as against the assured, until his name has been stricken off the policy." 2 *Philips on Insurance*, 367. 4 *Barn. and Ald.*, 395.

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Upon the whole, we think the plaintiff entitled to recover the value of the seven bales of cotton, deducting the amount of premium at one half per centum; but as the value is not shown by any evidence in the record, the case must be remanded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled at the cost of the appellees, and it is further ordered that the case be remanded for a new trial.



CALDWELL vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

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The price of immoveables producing fruits, bears interest from the time it is due, which is its accessory and forms part of the capital; and the privilege or mortgage of the vendor, extends to the accessory or interest as it becomes due on the price.

The vendor's privilege is a right arising out of the very nature of the contract; inasmuch as the transmission of the property is not perfect

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until the *price* is paid, which is composed of the capital and interest.
The interest represents the fruits of the immoveable sold.

But interest promised in an accordat with creditors, to be paid on a privileged debt, is not itself a privileged claim.

Interest continues to run on property ceded to creditors under the insolvent laws; even conventional interest is due on claims, when there is not a sufficiency to meet all.

In January, 1836, the syndic filed his tableau of distribution of the debts and claims of the insolvent's estate, and made the usual publication of notice for all concerned to show cause why the tableau should not be homologated.

C. Paulding made opposition, on the ground that he was a privileged creditor for the sum of three thousand dollars, with the *interest and costs thereon*; that this sum is due for part of the *price* of a lot of ground in New-Orleans, on which he retained the vendor's privilege and mortgage. The syndic refuses to put down the interest and costs of protest accruing on the note taken for the price, as a privileged claim. He prays that the tableau be so amended as to allow him the same privilege on the *interest and protest* as on the principal sum due for the price of the said lot of ground.

The district judge allowed so much of the interest as a privileged claim, as had accrued up to the time of the failure of the insolvent, and refused the remainder. The opponent appealed.

Hennen, for the appellant.

1. Interest is due on the amount of the note for three thousand dollars, from the time it became due and was protested until final payment; because the note was given for the price of property, producing fruits and revenues; and because the defendant was put *in morâ*. *Louisiana Code*, art. 2531.

2. The vendor is entitled to payment by privilege, not only of the note, but the *interest* thereon from the day of protest until final payment, and the costs of protest. *Louisiana Code*, art. 3162, 3216, 3219, § 2, 3221. 18 *Sirey*,

part. 2, 233. 16 *Duranton*, 370-1, No. 342. 15 *Merlin's* EASTERN DIST.
Rep. 443, *verbo intérêt.* 9 *Merlin's Questions du droit*, 30, March, 1836.
verbo intérêt.

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Maybin, contra.

Bullard J., delivered the opinion of the court.

The only question presented for our solution in this case is, whether the vendor of immoveable property has a privilege, on the thing sold, for the interest due on the price, arising *ex morâ*, as well as for the price itself.

It is conceded, that the price of immoveables susceptible of producing fruits, bears interest from the time it is due, without any formal demand or putting in delay. It is legal interest, and may be regarded as an accessory to the capital, and forms a part of the price itself. The privilege for the price extends, in our opinion, to the accessory. The question here presented was formerly much litigated in France under its modern legislation, but is now considered as settled by the highest judicial authority. The Court of Cassation, in its definitive decree, assumes, as the basis of its reasoning, that the privilege of vendors is a right arising out of the very nature of the contract of sale, inasmuch as the transmission of the property is not perfect until the price is paid, and that the price is composed of the capital and the interest which the law allows in the absence of any convention, such interest representing the fruits of the immoveables sold. 3 *Martin's Reports*, 91. 18 *Sirey*, 2, 233. 16 *Duranton*, No. 342.

The price of immoveables producing fruits, bears interest from the time it is due, which is its accessory, and forms part of the capital; and the privilege or mortgage of the vendor extends to the accessory or interest, as it becomes due on the price.

The vendor's privilege is a right arising out of the very nature of the contract, inasmuch as the transmission of the property is not perfect until the price is paid; which is composed of the capital and interest. The interest represents the fruits of the immoveable sold.

The counsel for the appellee has called our attention to the case of *D'Autrive vs. Degruy*, in which he supposes this court has settled a contrary doctrine. But the principle decided in that case was, that interest promised to be paid on a privileged debt was not privileged. *Degruy*, in a concordat with his creditors, had agreed to pay interest on certain privileged claims, and the court held that the promise did not create a privilege for the amount of interest. The interest in that case was not a legal accessory of the original debt. 2 *Martin N. S.* 117.

But interest promised in an accordat with creditors, to be paid on a privileged debt, is not itself a privileged claim.

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Interest continues to run on property ceded to creditors, under the insolvent laws; even conventional interest is due on claims, when there is not a sufficiency to meet all.

It is further contended, that interest ceases on the cession of property by the insolvent. This question was presented in the case of Hagan et al. *vs.* Sompeyrac et al., and this court held that even conventional interest was due on claims against an estate even where it is insufficient to meet all claims. 3 *Louisiana Reports*, 154.

We are, therefore, of opinion that the court erred in classing the interest due on the price of the property sold by the appellant to the insolvent as a simple debt without privilege; but that as to the costs of protest, the privilege does not attach, because the interest runs, in a case like this, without protest.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, so far as relates to the privileged claim of C. Paulding; and that his claim for three thousand dollars, together with interest at five per cent. from the time the same became due, be put down on the tableau as entitled to the vendor's privilege; and that the appellee pay the costs of this appeal.

NICHOLLS *vs.* HANSE ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

When the question at issue by the pleadings, is whether a certain engine was delivered as a condition, precedent to the defendants' right to take out execution against the plaintiff or not, no evidence will be received to prove damages for the detention and failure to deliver the engine.

This case commenced by a rule to show cause. The defendants took a rule on the plaintiff, to show cause why

execution should not issue against him for the amount of a decree or judgment of the Supreme Court, they having complied with its conditions and requisites on their part.

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The plaintiff showed for cause, that a certain engine named in the decree, had not been returned or tendered to him, which was required as a condition precedent to execution issuing.

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He further alleges that he had sustained three thousand dollars in damages by the unlawful detention of said engine, and the failure and inability of the defendants to deliver it, for which he prays judgment in reconvention, and a trial by jury, and an injunction to stay execution.

In the course of the trial, the plaintiff offered in evidence the record of the suit between the parties, which had been carried to the Supreme Court, and a decree rendered in favor of the defendants for three thousand two hundred and thirty-five dollars, after deducting the price of an engine, which they were to return. These proceedings were offered with the view to prove the damages the plaintiff had sustained by the detention and non-delivery of the engine. The District Court rejected this evidence as inadmissible, only admitting evidence in relation to the fact of delivery or non-delivery of the engine and its value. The plaintiff excepted to the opinion of the court.

The jury returned a verdict in favor of the defendants, upon which judgment was rendered, making the rule absolute; and that execution issue against the plaintiff for three thousand two hundred and thirty-five dollars, after deducting the value of the engine. The plaintiff appealed.

Preston, for the plaintiff and appellant.

Carleton and *Lockett*, contra.

Martin, J., delivered the opinion of the court.

The defendants, Hanse & Hepp, by their counsel came into the District Court for the first judicial district, and on suggestion made that they had complied with the terms and

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conditions of a certain judgment or decree of the Supreme Court, took a rule on the plaintiff to show cause why an execution should not issue against him, according to the decree of this court.

In answer to the rule, Nicholls replied that the defendants in said decree had neither delivered nor tendered to him, a certain engine mentioned in the decree, and that their detention and deterioration of said engine had caused an injury to him, for which he claims three thousand dollars damages in reconvention.

The issue thus made up on the rule, was submitted to a jury, who, on hearing the evidence of the case, found that the engine had been tendered by the defendants in the decree, to the plaintiff, in such a manner and condition as to discharge them from the obligation of a delivery.

The rule was made absolute, and the plaintiff has appealed to this court. At the trial of the case, the counsel for the plaintiff took a bill of exceptions to the opinion of the court, refusing him the right to offer in evidence the record and testimony of the suit, in which the judgment of this court was rendered, and under which the defendants claim the right to issue execution.

The evidence was offered, 1st. Touching the litigation between the parties on the subject matter of the rule. 2d. To show the damages claimed in reconvention. 3d. To show that the plaintiff was entitled to the small engine in controversy, before the institution of that suit, and had demanded the same. The court below admitted such testimony from the record as would show the engine had been deteriorated by the fault or negligence of the defendants, or establish its value, but for no other purpose. But it refused to allow any evidence in support of the claim for damages, because it considered the inquiry narrowed down to the single question, whether the engine had been delivered. All questions of damages were merged in the decree of the Supreme Court.

When the question at issue by the pleadings, is whether a certain engine was delivered, as a condition precedent to the defendant's right to take out execution against

It appears to us the District Court did not err in its decision on these questions. As to any thing the record showed, the

plaintiff had the benefit of it when the case was before this court on appeal, and the jury were called upon to inquire whether the defendants had complied with the requisites of the judgment or decree pronounced therein.

On the merits, the court below expressed its satisfaction with the verdict of the jury, and we find it supported by the evidence. The verdict and judgment must therefore stand.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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the plaintiff, or not, no evidence will be received, to prove damages for the detention and failure to deliver the engine.

CONWAY vs. WINTER.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the judgment is for the land, *described in the petition as about thirty arpents*, and which is all the plaintiff demanded, he cannot allege error and have the judgment amended, on the ground that on actual measurement the land is found to contain a larger quantity.

This is a petitory action. The plaintiff claims a tract of land, "measuring about thirty superficial arpents," situated in the suburbs of the town of Donaldsonville, comprised within certain defined and specified limits or boundaries, which she inherited from her mother. She shows that this land was partitioned and set off to her, as her portion of her mother's estate; but on attempting to take possession, she found the defendant already in possession, who claims the land in contest, under a written title. She prays that the premises be decreed to belong to her, and that she have judgment for possession and damages.

The defendant claims the land in dispute, under an authentic act, derived from the first husband of the plaintiff,

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and avers that the quantity comprised in the lot or tract described in the petition, is twenty superficial arpents and twenty-two-hundredths. He sets out minutely and in detail, his purchase from one Lawes, the first husband of plaintiff, and that it was sold to support that family.

In case of eviction, the defendant prays that the value of his improvements be allowed him.

The cause was on these pleadings submitted to the court, on the testimony adduced. The district judge presiding, was of opinion the plaintiff's title was completely made out; but regarding the defendant as a possessor in good faith, he is entitled to the value of his improvements. Judgment was rendered, confirming the plaintiff in her title to the land *described*, (about thirty arpents,) with such boundaries as are mentioned in the petition; also allowing the defendant one thousand two hundred dollars for his improvements, after deducting rents, and that no writ of possession issue to the plaintiff, until she pays this sum to the defendant. The plaintiff appealed.

J. Seghers, for the plaintiff and appellant.

Winter, in *propria persona*.

Bullard, J., delivered the opinion of the court.

This is a petitory action, in which the plaintiff sues for a lot of ground, described in the petition by specific boundaries, and alleged to contain about thirty superficial arpents. The defendant set up title under a sale to him by Lawes, the former husband of the plaintiff, and claims, in case of eviction, the value of his improvements, which he values at one thousand five hundred dollars.

Judgment was rendered in favor of the plaintiff for the land, with such boundaries as are described in the petition, amounting to about thirty superficial arpents; but the plaintiff was, by the same judgment, condemned to pay one thousand two hundred dollars, for improvements made on the land, and that no writ of possession should issue, until said sum was paid..

The plaintiff appealed, and in this court alleges as error, that the judgment ought to have been for thirty-five superficial arpents and sixty-two toises, instead of about thirty, and that the valuation of the improvements is too high.

The judgment is for the land, as described in the petition, which is all the plaintiff demanded. Having received the thing in contest, which is described with such certainty, as would enable possession to be given under a writ of possession, it appears to us quite immaterial, whether on actual measurement it should be found to precisely contain thirty-five arpents and sixty-two toises, or about thirty arpents.

With respect to the value of the improvements, there is some difference of opinion among the witnesses, not to say discrepancy in their testimony. The judge considered the clearing and ditching of the land, worth fifty dollars per arpent, and deducting from that the value of rents since the inception of suit, allowed twelve hundred dollars to the defendant. The evidence in the record does not enable us to discover, that he erred in his judgment.

But it is further urged, that on a former trial, the court allowed for improvements, a much smaller sum than was awarded on the second, and he thinks a medium at least ought to have been adopted, and he appeals to the authority of the Roman poet, in *medio tutissimus ibis*. We are not at liberty to regard the judgment first rendered, and which was set aside and a new trial granted, on the motion of the plaintiff herself, much less are we informed upon what evidence it was given. The Roman jurists are higher authority than the poets in matters of this kind, and we are taught by them, that it is not just that one man should enrich himself at the expense of another.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Where the judgment is for the land described in the petition as about thirty arpents, and which is all the plaintiff demanded, he cannot allege error and have the judgment amended, on the ground, that on actual measurement the land is found to contain a larger quantity.

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COOLEY
vs.
SEYMOUR.

COOLEY vs. SEYMOUR.

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52 1639

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

The occasional absence of the appellee from the state, does not dispense with the service of citation at his domicile.

An affidavit showing that at the time of service of citation on the counsel for the appellee, the latter *resided* in another state, will make the service good.

Errors assigned as apparent on the face of the record, that interest was allowed on an unliquidated claim; that the land was ordered to be seized and sold, to pay for the value of improvements allowed to the party evicted, and compensation made to the curator *ad hoc*, all in the same judgment, are well taken.

The fact that a cause was taken up and tried on a different day from that fixed on for its trial, is not of itself fatal.

When a curator *ad hoc* is a sworn attorney of the court, he will be presumed to have done his duty, when the contrary does not appear.

The curator *ad hoc* is responsible for his neglect to the party whose interests he is appointed to defend, and his faults or misconduct, are not to be visited upon the adverse party.

This is an action to recover from the defendant, the value of improvements made on a large tract of land, from which the plaintiff was evicted, which he alleges are worth three thousand dollars; that the defendant resides in England and has no known agent in this country, and no curator has been appointed to administer his property here. He prays that a curator *ad hoc* be appointed to defend said absentee, and that he have judgment, &c.

Charles Poydras, a member of the bar, was appointed curator *ad hoc*, who pleaded a general denial.

The cause was set for trial on a Saturday, and was not taken up until Monday following, when it was proceeded in

without any consent or appearance of record by the curator *ad hoc*. EASTERN DIST.
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The district judge presiding, rendered judgment in favor of the plaintiff for the sum of two thousand five hundred dollars as the value of his improvements, and ordered the land to be seized and sold to pay this sum; and likewise ordered fifty dollars to be allowed the curator *ad hoc* for his services, to be taxed as part of the costs, and paid by the defendant. The defendant appealed.

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Cooley, for the plaintiff, moved to dismiss the appeal as not taken in time, more than two years having elapsed from the time of *rendering* judgment. Judgment was rendered in November, 1833, signed in May, 1834, and the appeal granted the first of February, 1836.

2. The petition and citation of appeal were not legally served. ●

Mitchell, for defendant, assigned as errors apparent on the face of the record, those stated in the opinion of the court.

Martin, J., delivered the opinion of the court.

In this case a motion is made to dismiss the appeal. Its dismissal is prayed for on the ground that it was taken more than two years after the judgment was rendered, and for want of a legal service of the citation.

It is true, more than two years had elapsed after the judgment appealed from was rendered, before the appeal was taken, but two years had not expired after judgment was signed, until the appeal was granted. A judgment is inchoate only, and no appeal lies from it until it is made perfect by receiving the signature of the judge. No prescription runs against a party before he has acquired the faculty of acting and asserting his rights.

Two citations issued in this case, one was served on the appellee's wife at her residence in the parish of Point Coupée, and the place of her husband's domicile, the sheriff attesting

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The occasional absence of the appellee from the state, does not dispense with the service of citation at his domicile.

An affidavit, showing that at the time of service of citation on the counsel for the appellee, the latter resided in another state, will make the service good.

Errors assigned as apparent on the face of the record, that interest was allowed on an unliquidated claim; that the land was ordered to be seized and sold to pay for the value of improvements allowed to the party evicted, and compensation made to the curator *ad hoc*, all in the same judgment, are well taken.

The fact that a cause was taken up and tried on a different day from that fixed on for its trial is not of itself fatal.

When a curator *ad hoc* is a sworn attorney of the court, he will be presumed to have

he was absent from the parish, and as was believed, absent from the state. The other citation was served on the appellee's attorney, in the parish of West Feliciana, the sheriff attesting the fact that the appellee was out of the state.

The appellant has prevented the objection that might be made to the service of citation, as evidenced by the sheriff's return of the absence of the appellee, (which if occasional only, does not dispense with a citation at his domicile,) by an affidavit that, at the time of the service, the appellee resided in Philadelphia. The appeal must therefore be sustained.

The appellant further assigned, as error apparent on the face of the record, that interest was allowed, although the plaintiff's demand was unliquidated; that the land was ordered to be sold to satisfy a judgment for the value of the improvements made on it; and finally, that compensation was allowed to the curator *ad hoc*, to be taxed in the costs and paid by the defendant.

The errors thus assigned appear to be well taken, but there are others assigned as being apparent on the face of the record, which present a very different character. The record shows that the cause was tried on a different day from that which had been fixed for its trial, and, it is said, in the absence of the curator *ad hoc*. It is evident that this gentleman neglected to correspond with the defendant, who resided in England.

It often happens that causes are tried on days different from those fixed on for the trial, but this court has decided that this circumstance, is not of itself fatal. The absence of the curator *ad hoc*, at the time of the trial, is inferred from the circumstance that there was no cross-examination of the plaintiff's witnesses, and none introduced on the part of the defendant. But the plaintiff has shown that the curator *ad hoc* was present, and moved that he be allowed a compensation for his trouble, which was ordered.

The curator was a sworn attorney of the court, and must be presumed to have done his duty when the contrary does not appear.

He may have honestly concluded, in 'this case, in which he had only to see that the value of the improvements of the plaintiff, put on the land from which he had been evicted, should be accurately made and ascertained, that it was extremely improbable that any commission sent to England could afford any useful evidence or assistance in the cause. The plaintiff's counsel has very properly urged in argument, that the curator *ad hoc* is responsible for his neglect to the party whose interests he is appointed to defend, and his sins, whatever they may be, are not to be visited upon the plaintiff, imputed to his misconduct or his fault, nor to be answered for by him.

On the merits, the evidence shows that the plaintiff made out his case, and established his claim for improvements.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of two thousand five hundred dollars, with costs in the District Court, and that he pay those of the appeal.

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done his duty, when the contrary does not appear.

The curator *ad hoc* is responsible for his neglect to the party whose interests he is appointed to defend, and his faults or misconduct are not to be visited upon the adverse party.

STEIN vs. STEIN'S CURATOR ET AL.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. TAMMANY.

Parole evidence is admissible to prove filiation and heirship generally; but when it is shown that there exists record or written evidence, or its existence is rendered highly probable, it ought to be produced, especially where several persons, strangers to each other, claim the succession.

The certificate of an American consul, residing in a foreign country, attesting the official character of an officer of that country, before whom the depositions of witnesses are taken, is *insufficient* to make them legal evidence.

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STEIN
v.
STEIN'S
CURATOR ET AL.

It is not the duty of an American consul to attest the signatures of public functionaries, in the countries where they reside; and in order to give their certificates the form of testimony, it will be necessary to show that this is one of their consular functions.

This is an action, in which the plaintiff, John Frederick Stein, residing in Germany, by his attorney in fact, sues the defendants to be recognised as heir, and put in possession of the estate of Nicholas Stein, deceased, in the parish of St. Tammany, whom he alleges was his brother.

William Bowman, the curator, and M. G. Penn, attorney for absent heirs, were made defendants. They filed their joint answer and pleaded the general issue, and denied specially that the plaintiff was heir or brother of the late Nicholas Stein, and requiring strict and legal proof thereof. The curator further declared, that he was ready to account to the true and lawful heirs, whenever they should cause themselves to be recognised.

In the meantime, one Andreas Stein presented himself as heir of Nicholas Stein, deceased, and instituted his action, which was cumulated with this one, and the two tried together.

The cause was submitted to the judge of probates, on the documentary evidence adduced by the parties, some of which was rejected as not sufficiently authenticated, and not the best testimony the nature of the case admitted. The objection to the testimony, and its insufficiency to make out the plaintiff's case, is fully set out in the opinion of this court.

The probate judge decided against the plaintiff, John F. Stein, and rejected his pretensions to the heirship. He appealed to this court.

Grymes and Chinn, for the plaintiff.

L. Janin and Eustis, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff in this case sues to be recognised and admitted as heir at law of Nicholas Stone, alias Stein,

deceased, and to compel the curator of his estate to render an account of his administration, and to surrender into his hands the property belonging to the succession. The attorney of absent heirs and curator were made parties, and by their answer deny specially that the plaintiff is heir of Nicholas Stone, the curator avowing his readiness to account to the heirs of the deceased, whenever they shall cause themselves to be recognised by the Court of Probates.

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It appears that the deceased was by birth a German, who had no relations in this country, in which he had resided for many years, without any correspondence with his family. On his decease without children, or any known heirs in the country, several persons in Germany came forward to claim his succession, and instituted proceedings against the curator and the attorney of absent heirs, which are yet pending. Among others was the present plaintiff, who alleges that he resides in Hanover, and that he is the brother and sole heir of the deceased. The Court of Probates not being satisfied with the proof of heirship adduced by the plaintiff, gave judgment against him, and he appealed.

On the trial below, the plaintiff offered to read in evidence the deposition of two witnesses taken on commission. Numerous objections were made to the introduction of that evidence, founded partly on certain alleged informalities in the issuing of the commission, and its return, and partly on the nature and inconsistency of the evidence itself, to prove the relationship existing between the plaintiff and the deceased. The court rejected the evidence, and a bill of exception was taken.

It appears to us that the defendants had an opportunity to file cross-interrogations before the commission was issued, and that the questions to be put to the witnesses, on the part of the plaintiff, were communicated to the adverse party, as provided by the Code of Practice, and that the commission issued was correctly executed. But we think the objection to the competency of the evidence to prove the heirship of the plaintiff, was, under the circumstances of this case, properly sustained. Parties are always bound to produce the

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Parole evidence is admissible to prove filiation and heirship generally; but when it is shown that there exists record or written evidence, or its existence is rendered highly probable, it ought to be produced, especially when several persons, strangers to each other, claim the succession.

best evidence within their power, and cannot resort to secondary evidence, when it is apparent that they have some of a higher character within their reach. Parole evidence is certainly admissible to prove filiation and heirship generally, but when it is shown that there exists record, or written evidence, or its existence is rendered highly probable, it ought to be produced, particularly in a case situated like the present, in which several persons, strangers to each other, claim the same succession as heirs of the deceased, adversely to each other. Now it appears that the deceased was a native of Hanover, in Germany, and that he died at the age of sixty-four years, and after an absence of twenty-five or thirty years from his native country, without having had any correspondence with his relations. It is shown by the testimony of Mr. Roselius, a member of the bar, and a native of the same country, that registers of baptism are kept with great accuracy in the kingdom of Hanover; that in the registry the time of birth is generally mentioned, and that much importance is attached to such entries. Although this evidence alone, without proof that such registry is required to be kept, and that certified extracts from them are made evidence of filiation by the laws of Hanover, might not be sufficient to exclude parole evidence, yet it further appears, that a file of documents, in the German language, which was annexed to the petition, and finally offered in evidence by the plaintiff in the further progress of the trial, contained a document purporting to be a certificate of baptism of John Frederick Stein. Such a document, if duly authenticated, would appear to us evidence of a higher character than the testimony of witnesses, whose opportunities of knowing the parties appears to be very limited. The plaintiff himself alleges in his petition, that the German document above referred to, contains a power of attorney, and evidence of heirship of John Frederick Stone, which he deems entirely sufficient.

The document in the German language was rejected by the court, on the ground that it was not sufficiently authenticated. The only intelligible certificate annexed, is one by

the American consul at Hamburg, "that F. W. Kern, whose signature is on the annexed documents, is the chancellor of the Hanoverian embassy to Hamburg, and that full faith and credit are due to the same." We are of opinion that the court did not err in rejecting the evidence. It does not appear to be one of the duties of American consuls in foreign countries, to attest the signatures of public functionaries in countries in which they reside. In the case of *Church vs. Hubbard*, chief justice Marshall, in delivering the opinion of the court, said, "To give this certificate the form of testimony, it will be necessary to show that this is one of the consular functions, to which, to use its own language, the laws of this country attach full faith and credit." The same doctrine has been repeatedly recognised by this court. 2 *Cranch's Reports*, 187, 237. 4 *Martin's Reports*, 285 and 85.

But the court below ought, in our opinion, to have given only a judgment of non-suit, instead of a final one in favor of the defendant. In this respect it must be reformed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Probate Court be reversed, and ours is in favor of the defendants, as in the case of a non-suit, with the costs in the Probate Court, the defendants and appellees to pay the costs of the appeal.

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The certificate of an American consul, residing in a foreign country, attesting the official character of an officer of that country, before whom the depositions of witnesses are taken, is *insufficient* to make them legal evidence.

It is not the duty of an American consul to attest the signatures of public functionaries, in the countries where they reside, and in order to give their certificates the form of testimony, it will be necessary to show that this is one of their consular functions.

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9L 283
44 624

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. TAMMANY.

Until an heir is recognised and admitted as such, he has no action against the curator or administrator of the estate of the deceased, to compel an account, and is not entitled to notice of the proceedings in relation to the administration. In the meantime, the attorney of absent heirs can call on the administrator to render an account.

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STEIN
vs.
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CURATOR, ETC.

A provisional account and prolongation of the administrator's term, is not conclusive on the heirs at law, who may afterwards appear and be recognised. The judge is to receive and approve such account on his official responsibility, contradictorily with the attorney for the absent heirs.

The fee, or allowance to the attorney of absent heirs, and to the attorney of the curator of an estate, should be graduated by the value of the services rendered.

This case commenced by an opposition to the account filed by the defendant, as curator of Nicholas Stein's estate, and to the prolongation of his term. Bowman presented an account to the Court of Probates for the parish of St. Tammany, of his first year's administration, and prayed that it be homologated, and that he be continued another year in his curatorship. The amount of available funds accounted for, was three thousand six hundred and forty-four dollars. The disbursements consisted of one thousand five hundred dollars each, to the attorney for absent heirs, and the attorney to the curator; in all, three thousand dollars, with other payments to the amount of four hundred and fifty dollars, leaving a balance on hand of one hundred and ninety-four dollars. The probate judge approved and homologated the account, and re-appointed the curator for another year.

John Frederick Stein, while his application and suit was still pending to be recognised and admitted as heir to Nicholas Stein, filed his petition and made opposition to the order of the probate judge approving the curator's account, and prayed that the order be set aside, and that the curator and attorney for absent heirs be required to settle the accounts of said estate, and pay over the proceeds to him as lawful heir, &c. The grounds upon which the opponent moved to set aside the account and order approving it, are fully stated in the opinion of this court, now reported.

The probate judge overruled this opposition and motion, and Stein appealed.

Grymes, Eustis and Chinn, for the opponent and appellant, made the following points:

1. The probate judge erred in allowing the defendant, in the settlement of his account, the two items of one thousand five hundred dollars each, to the two attorneys of absent heirs and of the curator.

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2. The whole proceeding of the judge of probates in homologating and approving the curator's account, and his reappointment, are erroneous and illegal on their face, and should be set aside.

L. Janin, contra.

Bullard, J., delivered the opinion of the court.

This case must be considered as intimately connected with the one between the same parties, just decided, and the two were in fact tried together.

It appears, that the curator of the vacant estate of Nicholas Stein, at the expiration of the year of his curatorship, filed an account of his administration, and prayed for a renewal or continuation of his curatorship for another year. The account was approved by the court, contradictorily with the attorney of absent heirs, and the curatorship prolonged.

John F. Stein, the appellant, and whose suit to be recognised as heir, was still pending, several days after this order was given, came into court, and by his attorney filed a written motion to set aside the proceedings, on the following grounds: 1st. That the order purports to be a judgment homologating the curator's account, and reappointing him for another year, and as such is void, because rendered out of term time, and *ex parte*; 2d. That the appearer had already cited the curator to render an account, and to surrender the estate to him as heir at law of the deceased, and that said account should have been rendered in that suit, or at least he should have been cited or notified of the application for reappointment; 3d. That the account was homologated without proof of its correctness, and the charges are not supported by vouchers; 4th. That the allowance of one thousand five hundred dollars to the attorney of absent heirs, is extravagant and highly exorbitant, no services having been rendered by him to entitle him to such a sum, and

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CURATOR, ETC.

Until an heir is recognised and admitted as such, he has no action against the curator or administrator of the estate of the deceased, to compel an account, and is not entitled to notice of the proceedings, in relation to the administration. In the meantime the attorney of absent heirs can call on the administrator to render an account.

A provisional account; and prolongation of the administrator's term, is not conclusive on the heirs at law, who may afterwards appear and be recognised. The judge is to receive and approve such account, on his official responsibility, contradictorily with the attorney for absent heirs.

The fee or allowance to the attorney of absent heirs, and to the attorney of the curator of an estate, should be graduated by the value of the services rendered.

that the allowance of one thousand five hundred dollars to the attorney of the curator, J. R. Jones, is exorbitant, and without evidence of his having rendered any services; 6th. That the sum of one hundred dollars paid to the judge, was illegally paid, no fee bill having been exhibited; 7th. That all the charges are liable to similar objections.

This motion was overruled, and the opponent appealed.

To the two first grounds of opposition, it appears to us a sufficient answer, that until the appellant had been admitted as heir of the deceased, he had no action to compel an account, and was not entitled to notice of any proceedings had in relation to the administration of the estate. The Louisiana Code provides, that until an heir has been recognised and admitted, the curator may be called to render an account by the attorney of absent heirs. *Louisiana Code*, 1181, 1182, 1183.

With respect to the remaining objections, this court feels itself bound to remark, that although the appellant has not shown any right to interfere, and although we cannot adjudicate on the correctness of the account rendered by the curator, as the case is now presented to us; yet we consider such provisional account as not conclusive on the heirs at law, who may afterwards appear and be recognised as such. The judge is to receive and approve such account on his official responsibility, contradictorily with the attorney of absent heirs, and to order the balance in the hands of the curator, whose term is prolonged, to be paid over to the state treasurer. *Louisiana Code*, 1197, 1198. The estate consists principally of money and stocks, and evidences of debts due the deceased, and we see no evidence accompanying the account, which justifies the allowance of one thousand five hundred dollars each, to the attorney of the curator, and the attorney of the absent heirs. It has long been a subject of just reproach, that extravagant allowances are made to counsel in relation to the administration of estates; it is an abuse which can only be corrected by the courts inflexibly adhering to the rule, to graduate the fee by the value of the services rendered.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Probate Court, overruling the motion, be affirmed, with costs.

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RICHARDSON
vs.
GURNEY.

RICHARDSON vs. GURNEY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Money due to the plaintiff is a proper object of attachment by any of his creditors; even the defendant who owes it, may attach the amount of the judgment and execution, against himself, in a suit against the plaintiff for a sum equal or greater in amount.

Where money owing by the defendant in execution is deposited in the sheriff's hands, and attached by the former in a new suit against the plaintiff, it will not be considered as money made on the execution, but only pledged for the sheriff's indemnification.

This is a case in which the defendant in an execution attached the amount of the debt after he had paid it into the sheriff's hands, in a suit for a larger sum, which he had in the mean time instituted against the plaintiff. *Vide* the facts of the case reported in 8 *Louisiana Reports*, 255.

On the return of the case to the District Court, the plaintiff's counsel took a rule on the sheriff, to show cause why he should not pay over the money collected on the execution against the defendant, to the plaintiff.

The sheriff showed for cause the attachment suit of the defendant in the execution, and the return on it, in which it appears the money paid by him into the hands of the sheriff, in discharge of the execution against him, was by himself attached at his own suit against the plaintiff.

The testimony and return of the sheriff shows, that at or about the time the plaintiff's *fi. fa.* came into his hands, the

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defendant, Gurney, issued an attachment against the plaintiff and placed it in the sheriff's hands, with orders to levy it on any property of the plaintiff, and particularly on the amount of the judgment in the above suit against the defendant; but the sheriff doubting whether he could omit the execution of the *fieri facias* against the defendant, his attorney deposited in his (the sheriff's) hands the amount of the execution, which the sheriff bound himself to hold until the validity of the said attachment should be decided on.

The district judge, on this evidence, discharged the rule. The plaintiff appealed.

McHenry, for the plaintiff.

1. The judge *a quo* erred. The judgment which defendant intended to have *attached* had been satisfied, inasmuch as the amount of the judgment had been received by the sheriff on the *fi. fa.* before the service of the attachment on defendant.

2. The rule taken on the late sheriff, by the appellant, ought not to have been dismissed. The money had been made on a *fi. fa.*, and was in his hands.

3. The record in the case of Gurney *vs.* Richardson ought not to have been admitted in evidence on the trial of said *rule*, the suits being entirely distinct and having no connexion.

Maybin, for the defendant.

Martin, J., delivered the opinion of the court.

This case comes before us on a rule requiring the sheriff to pay over to the plaintiff certain moneys, by him collected on an execution, in favor of the plaintiff, against the defendant. The case was before this court last year, when the judgment of the District Court, quashing the execution under which the money was collected, was reversed and set aside. *Vide 8 Louisiana Reports, 255.*

When the cause was sent back, the plaintiff resorted to a rule on the sheriff, requiring the money thus collected by him to be paid over to the plaintiff in the execution. The rule was discharged, and the plaintiff has appealed to this court.

The evidence of the case shows, that shortly after the execution issued, the defendant put into the sheriff's hands an attachment against the plaintiff's property, and requested that officer to levy it particularly on the judgment of the plaintiff against him, on which execution issued. The sheriff being in doubt as to the course which it became him to pursue, the defendant deposited in his hands the full amount of the judgment and execution, and directed it to be held subject to his attachment. The sheriff consented to retain the deposit until the validity of the attachment and its effect could be tried and decided on by the court.

We are of opinion, the district court *did not err* in discharging the rule. The money due by the defendant to the plaintiff was a proper object of attachment at the suit of any of his creditors; and although the neglect of the defendant to oppose the claim he now seeks to enforce, by pleading it in compensation and reconvention, in the suit in which judgment was obtained by the plaintiff, might be an objection to relief sought by an injunction, yet nothing prevents a new suit being instituted, in which this money is liable to attachment.

The money in the sheriff's hands was not by him made on the execution, which he was prevented from proceeding on by the attachment. It is still the money of the defendant, pledged to the sheriff for his indemnification.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, discharging the rule, be affirmed, with costs.

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Money due to the plaintiff, is a proper object of attachment by any of his creditors; even the defendant who owes it, may attach the amount of the judgment and execution, against himself, in a suit against the plaintiff, for a claim equal or greater in amount.

Where money owing by the defendant in execution, is deposited in the sheriff's hands, and attached by the latter in a new suit against the plaintiff, it will not be considered as money made on the execution, but only pledged for the sheriff's indemnification.

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vs.

PURVIS ET AL.

JONES ET AL vs. PURVIS ET AL.

9 288
115 865APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
OF THE SECOND PRESIDING.

In a petitory action, a judgment of eviction of the vendor of the plaintiff, before he sold, by the defendant, in a possessory action when the former was his tenant, and attempted to hold the land in dispute, in his own right, will not be received in evidence, or considered as *res judicata* in favor of the defendant's right to the land.

So, in a petitory action, the vendor of the plaintiff cannot be made a party on an allegation of the defendant, that he obtained his title fraudulently from the government under the pre-emption laws. There is no privity between these persons.

Fraudulent and dishonest acts, done by the vendor of the plaintiff against the rights of the defendants, cannot affect them, unless it be shown that they were *participes fraudis*, by combining and colluding with the defrauder.

As between the lessor and tenant of a tract of land, if the latter find the true title is in another, he has the right to purchase it and hold the land, without being considered as acting fraudulently towards his lessor.

But as to purchasers under pre-emption laws, and in ordinary cases, perhaps a distinction might be made when the purchaser used the means he had received from his lessor of obtaining by pre-emption, when the latter would have been entitled to the preference by the same law.

This is a petitory action, in which the plaintiffs sue to recover a quarter section of land in the possession of the defendant.

It is alleged and shown, that one Benjamin Craft purchased the land in dispute from the government of the United States, at the government prices, as a pre-emption claim, on the 7th of May, 1831, who, on the 12th February, 1833, sold it to the petitioners.

The defendant, Purvis, disclaimed any interest in the suit, or title to the land, but stated that he was in possession as the tenant of S. Tillotson. He prays that Tillotson be notified of the suit, and cited to defend therein.

Tillotson denied the plaintiffs' right to the land in question, and averred that on the 7th May, 1831, and previously, B. Croft occupied it as his tenant; that at the said date, Croft fraudulently and falsely obtained the register's certificate, by representing to him possession in himself, and concealed this purchase, still continuing in possession, until dispossessed in a possessory action; that the land in fact belonged to this respondent as a pre-emption right, and that by the fraud and collusion between the plaintiffs and Croft, he is cheated out of his said right to this land. He prays that Croft be made a party and required to defend his interests, and that the act of sale to the plaintiffs be cancelled, and that he be decreed to be the owner of the land mentioned in the register's certificate.

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The part of the answer of Tillotson requiring Croft to be made a party, was rejected, and a bill of exceptions taken to the opinion of the court.

The evidence shows that the land in dispute belonged to the government, and was settled and improved by Tillotson; that Croft and one of the plaintiffs (Jones) were put on the land as his tenants, and continued thereon until after Croft purchased from the United States in May, 1831. Tillotson had the privilege to enter it as a pre-emption right, but omitted doing so until his tenant stepped in before him.

Several bills of exception were taken, as stated in the opinion of the court.

The district judge who tried the cause, was of opinion the plaintiffs made out a complete legal title to the land, and that the defendant showed none. Judgment was rendered for the plaintiffs, from which the defendant appealed.

Edwards and Ives, for the plaintiffs.

Davis, for the defendant in warranty.

Mathews, J., delivered the opinion of the court.

This is an action of revendication, in which the plaintiffs sue to recover a certain tract of land, (as described in their

EASTERN DIST. petition,) alleged to be in the possession of the defendant,
 March, 1836. Purvis. He disclaimed title to the property in dispute, as

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In a petitory action, a judgment of eviction of the vendor of the plaintiff, before he sold, by the defendant, in a possessory action, when the former was his tenant, and attempted to hold the land in dispute in his own right, will not be received in evidence, or considered as *res judicata*, in favor of the defendant's right to the land.

So, in a petitory action, the vendor of the plaintiff cannot be made a party, on an allegation of the defendant, that he obtained his title fraudulently from the government, under the pre-emption laws. There is no privity between these persons.

Fraudulent and dishonest acts done by the vendor of the plaintiffs, against the rights of the defendant cannot effect them, unless it be shown that they were *participes fraudis*, by combining and colluding with the defrauder.

As between the lessor and tenant of a tract

being only a tenant of Tillotson, who appeared in the cause and made defence. Judgment was rendered against him in the court below, from which he appealed.

The title set up to the lands sued for, by the plaintiffs, is an act of sale from one Benjamin Croft, who held by purchase from the United States, under a pre-emption law passed by Congress, and a receipt given by the receiver of public money for the general government is adduced as evidence of the purchase, &c. The defendant and appellant shows no title in himself, by any evidence appearing on the record. All the proof offered by him tends to establish only a naked possession, unsupported by any title. It shows that Croft had been his tenant in actual possession, and that when he attempted to hold in his own right, he was evicted, by a possessory action brought by his lessor. The judgment in that case is insisted on as *res judicata* in the present. It cannot be considered in that light, for title therein was not in any manner brought in question; and as all the authorities cited on the part of the appellant relate to possession and the possessory action, they may be dismissed without comment, as inapplicable to that now under consideration. The balance of the defence consists in allegations of fraud committed by Croft, in obtaining title from the United States, under the provisions of the pre-emption law; and an attempt was made to bring him in as a party to the present suit, on application to the court made by Tillotson, which was rejected, and we think properly, there being no privity in the present instance between those persons. Any fraudulent and dishonest acts done by the vendor of the plaintiffs against the rights of the defendants, cannot effect them, unless it be shown that they were *participes fraudis*, by combining and colluding with the defrauder to aid him in his dishonesty. The record affords no satisfactory evidence of any such combination and confederacy to cheat. They (the plaintiffs) must therefore be considered as innocent purchasers of a title, apparently fair and legal, vested in the seller. If the

contest were directly between Croft and Tillotson, the former could not acquire any possession independent of that holden under the latter as his tenant ; but if he discovered that the title to the property was in another, we do not believe that a purchase of such title by the lessee ought to be considered as fraudulent, in relation to the lessor, although he might thereby lose the opportunity of making the purchase for himself, nor could any objection be made to a title thus obtained, on this ground, in an action of revendication. Perhaps a distinction might be made between purchases under laws granting a right of pre-emption and ordinary cases, when the purchaser used the means of obtaining by pre-emption, that which he had received from a person legally entitled to the preference, in buying under the law granting pre-emptions. But any equitable claims which might exist between parties thus situated, cannot be pleaded against the rights acquired by third persons in pursuance of a title apparently just and legal, without notice of the existence of such equity, previous to their acquisition.

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of land, if the latter find the true title is in another, he has the right to purchase it and hold the land, without being considered as acting fraudulently towards his lessor.

But as to purchasers under pre-emption laws, and in ordinary cases, perhaps a distinction might be made, when the purchaser used the means he had received from his lessor, of obtaining by pre-emption, when the latter would have been entitled to the preference by the same law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

FOUTELET ET AL vs. MURRELL.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, THE JUDGE OF THE FOURTH PRESIDING.

A judgment obtained by the heirs of the deceased wife against the surviving husband, annulling the adjudication of the property of the succession to him, on the ground that it was the wife's exclusive property, and made through error, cannot affect purchasers and mortgagees of this property from the husband. It is as to them *res inter alios acta*.

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Where the property of a succession is adjudicated to the surviving husband as *common property* through error, (it being the wife's exclusive property) and this sale is ratified by the heirs, on having their respective shares of their deceased mother's succession set off to them by the husband, any contract of mortgage he may make, will bind this property in favor of third persons, who contract on the faith of these public acts.

This suit commenced by injunction to stay the sale of a slave, seized under execution in favor of Murrell, the plaintiffs in injunction also claiming the slave as their own. They allege they are the children and forced heirs of Catharine Doublin, late wife of Joseph Foutelet; that at the decease of their said mother, in 1816, she owned considerable property, which she inherited from her father, consisting of a tract of land on the Lafourche, and several slaves, which their father and natural tutor, Joseph Foutelet, falsely and fraudulently had inventoried and adjudicated to himself as community property, when in fact it was the separate and paraphernal property of their mother.

That on coming of age, the youngest of the plaintiffs' had the adjudication of this property to their father annulled, as made in fraud, and the property ordered to be re-sold.

In the meantime, and while Joseph Foutelet was in the full enjoyment of this property, he conveyed half of his interest in it to Godefroy Foutelet and Emile Gourdault. One of the slaves thus conveyed, had been mortgaged in May, 1832, to secure a debt, and was seized under an execution in favor of John D. Murrell, which issued on a judgment he had obtained against these persons, on this mortgaged debt, amounting to five hundred and fifty-three dollars and fifty-three cents, with interest from the 20th April, 1833, until paid.

The defendant pleaded the general issue, and averred that there was sufficient property to satisfy the plaintiffs' claim, if any they have, without interfering with the rights of the defendant.

- 1st. The plaintiffs claim this slave in right of their mother.
- 2d. The adjudication to Foutelet, the father, being annulled by the Probate Court, the slaves of the succession, including

Pierre, the one under seizure, were no longer liable to Foutelet's creditors.

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The evidence showed that the slave Pierre in question, with others, were inherited by the mother of the plaintiffs from her father, N. Dublin, and received by her during her marriage with Joseph Foutelet.

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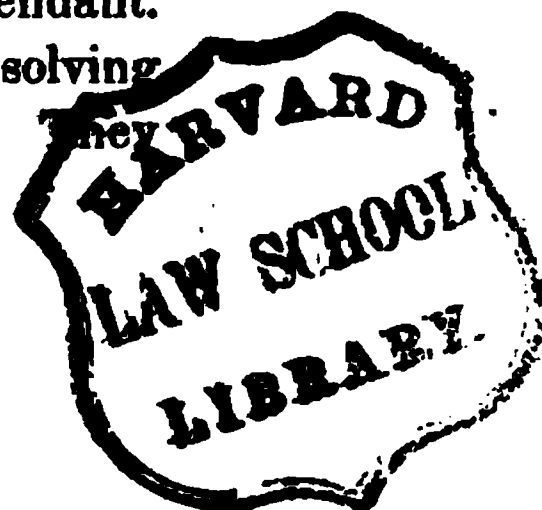
In 1817, all the property held by Foutelet and wife, after the death of the latter, including that inherited by her in her lifetime, and the slave Pierre, was inventoried and appraised as community property, and adjudicated to the former by the judge of probates for the parish of Ascension, at its estimative value in the inventory, amounting to eight thousand five hundred and ninety-four dollars.

Foutelet then set apart the amount of property which his deceased wife inherited, and as belonging exclusively to herself, and also her half of the community property, and her dotal effects, amounting to four thousand seven hundred and forty-two dollars, which sum he divided into seven shares among her seven children, (including the plaintiffs,) which gave to each six hundred and seventy-seven dollars and three-sevenths, and for which they subsequently signed receipts and acts of ratification. This transaction or partition, was made in February, 1817. Foutelet continued in the undisputed possession of all the property at its appraised value.

But Hypolite Foutelet, when he became of age, instituted a suit in the Probate Court, in 1834, to annul and set aside the adjudication of this property to his father, and on the 7th July, 1834, obtained a decree to that effect, ordering that it all be re-sold to effect a partition among the heirs.

In 1832, the slave Pierre was mortgaged to Murrell to secure the payment of the note upon which judgment was obtained, and the slave seized and sold.

Upon this evidence, the case under the pleadings was submitted to a jury, who returned a verdict for the defendant. Judgment was rendered confirming the verdict, and dissolving the injunction with costs to be paid by the plaintiffs. They appealed.



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Conrad, for the plaintiffs.

1. That the slave *Pierre* was the paraphernal property of their mother, and was inherited by her children. The adjudication of the property comprising her succession was a mere nullity, and conveyed not even a shadow of title. It was a gross violation of duty on the part of the tutor, and whether originating in fraud or in error, it could avail him nothing.

2. The receipts given by the heirs, of the portions respectively due to them in virtue of this adjudication, were evidently the result of the error into which they had been led by the previous adjudication. Even had they contained an express relinquishment of all claim to the property, this agreement, founded in *error* in regard to their legal rights, an error superinduced too by the fraudulent concealment of their tutor, would not be binding on them. *Louisiana Code*, 1887-1890. 5 *Martin*, N. S. 260. 7 *Martin*, N. S. 12.

3. Even had the plaintiffs made an express and formal relinquishment of their rights to their mother's succession, with a full knowledge of all the facts and of their legal rights, this would have been an agreement without a consideration, (at least for the one half which their father assumed to belong to him, and for which he allowed them nothing,) and consequently a *donation*. Now none of the forms requisite to the validity of a donation *inter vivos* have been complied with, and this defect could only be cured by executing a new act in proper form. *Louisiana Code*, art. 2253.

4. Even the pretended act of ratification made by Hypolite Foutelet cannot have the effect contended for by defendants, for the following reasons: 1st. That the party making it did not intend thereby to ratify or confirm the adjudication to Joseph Foutelet; his purpose was a very different one, to disavow the act of his brother-in-law in purchasing one third of the property of the succession in his name. The other transaction is merely incidentally mentioned; to make a remuneration valid, it is necessary that the confirmative act should expressly mention the causes of nullity that exist,

and the intention to cure them. *Louisiana Code, art. 2252.* EASTERN DIST.
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 2d. Because in fact there was nothing to ratify or confirm; FOULETET ET AL.
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 no contract existed against which an action of rescission would lie. It was not the case of a contract void or voidable, on account of incapacity of a party, or defect of form or other vices; no contract had ever been made; it was simply the case of a person, by his own act, attempting to usurp a title to property, without a color of title, and with a full knowledge of the title of another. Now an act of confirmation of such a title should contain in itself an absolute and express conveyance of the property. See on this point *Merlin's Repertoire verbo Ratifications, No. 9, case of La Venne Crispin.*

4. This was not intended as a contract, and has not the form of one: there is but one party to it. It was meant simply as a protestation against an unauthorised act, and a reservation of his rights. It was not even a *stipulation pour autrui*, and as the party only appears to have had his own interest in view in making it. Even had it been such, or granting it to be such, he would have the right to revoke it so long as it was not accepted by the third person. *Toullier, liv. 3, ch. 3, sect. 6, No. 341.*

5. But all these acts were void on another account. They were in fact settlements between a tutor and his ward, and were not preceded by a rendition of account and delivery of vouchers. *Louisiana Code, art. 355. Paillet Manual de Droit, 472. 1 Delvincourt, 129, 310.*

Nicholls, for the defendants, contended:

1. That the verdict of the jury was correct on the merits of the case, and fully sustained by the evidence.

2. In such cases as this, the verdict of the jury will not be disturbed unless manifestly erroneous. In questions of fact, it is the peculiar province of the jury to decide, *ad questiones legis respondent judices; ad questiones facti respondent juratores.*

3. The purchasers and creditors of Foutelet are not to be affected by informalities in the proceedings, by which the property held by him and his wife was adjudicated to him;

EASTERN DIST. these informalities, whatever they were, are cured by the
April, 1836. subsequent ratifications of the plaintiffs themselves.

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Bullard J., delivered the opinion of the court.

The appellee Murrell having recovered a judgment against Joseph and Godefroy Foutelet and Emile Gourdault, took out an execution or order of seizure and sale, which was levied on a slave named Pierre, which had been mortgaged for the security of his debt. Proceedings were stayed by injunction, at the suit of Paul Foutelet, Felonice Foutelet, wife of Emile Gourdault, and Rosalie Foutelet, wife of Pennier, on the grounds: first, that the slave Pierre is their exclusive property, as heirs of their deceased mother, Catharine Doublin, and secondly, that by a decree of the Court of Probates, the adjudication of him to their father and tutor, together with other property, as belonging to the community, had been declared null and void, and that the property had been ordered to be sold to effect a partition. In answer to the petition for injunction, the defendant plead a general denial, and further avers, that there was sufficient property to satisfy the claim of the plaintiffs, if any they have, without interfering with his rights.

There was a verdict in favor of the defendant, and the injunction having been dissolved, the plaintiffs appealed.

That Pierre was the property of Catharine Doublin, the mother of the plaintiffs, and wife of Joseph Foutelet their father, and formed a part of her paraphernal estate, is abundantly shown, and the question whether they have been divested of title, forms the principal difficulty in the case. It appears that their father, after the death of their mother, caused the whole property to be inventoried, as belonging to the community, and to be adjudicated to him by the Court of Probates, at the price of appraisement. He afterwards sold one undivided half of the land and slaves, and among the rest Pierre to Godefroy Foutelet, his son, and Emile Gourdault, his son-in-law, and to one of the plaintiffs, Paul alias Hypolite Foutelet, then a minor, whom his brothers assumed to represent, but who, after arriving at

the age of majority, disclaimed the purchase, preferring to claim his share in his mother's estate, as established by the settlement in the Probate Court, in 1817.

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It is contended, on the part of the defendant, that however erroneous the proceedings may have been, on the part of the father, in causing to be adjudicated to himself the property belonging exclusively to the heirs of his wife, yet the plaintiffs have ratified those acts, and received the price of that adjudication, and are thereby precluded. 8 *Martin*, N. S. 5, 18. 6 *Louisiana Reports*, 601. The record furnishes us a copy of an authentic act, dated September, 26, 1832, by which it appears that Madame Pennier acknowledges that her father has rendered her an account of the estate of her mother, and that she is satisfied by the vouchers in support of the account, that the portion coming to her amounts to six hundred and seventy-seven dollars and three-sevenths, which sum she acknowledges to have received from her father, and she releases the mortgage in her favor, on his property resulting from his tutorship. Another document in the record shows, that Madame Gourdault, another of the plaintiffs, about the same period, gave a similar receipt and discharge to her father. The other plaintiff, Paul alias Hypolite, at the same time that he repudiates the purchase made for him, declares that he intends to insist on his rights, as one of the heirs of Catharine Dublin, such as they are established in the account of the succession rendered on the 10th February, 1817, by his father, before the Court of Probates, his rights amounting to six hundred and seventy-seven dollars and three-sevenths. He declares that he approves that account, and the adjudication of the property, on the same day, to his father, acknowledging that nothing more is coming to him than the above mentioned sum, for which, and the accruing interest, he has a mortgage on all the property of his father, but which he restrains in its operation to the land and slaves in question.

The only difference between the three is, that the two first acknowledge to have received their share of their mother's estate, and the last, (Paul,) although he has not

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A judgment obtained by the heirs of the deceased wife, against the surviving husband, annulling the adjudication of the property of the succession to him, on the ground that it was the wife's exclusive property, and made through error, cannot affect purchasers and mortgagees of this property from the husband. It is as to them *res inter alios acta*.

Where the property of a succession is adjudicated to the surviving husband as *common property*, through error, (it being the wife's exclusive property,) and this sale is ratified by the heirs, on having their respective shares of their deceased mother's succession set off to them by the husband, any contract of mortgage he may make, will bind this property in favor of third persons, who contract on the faith of these public acts.

received his share expressly, ratifies the adjudication to his father, and contents himself with the amount shown to be due him on the basis of that settlement, secured by a legal mortgage on the land, and among others of the slave Pierre.

But it is urged by the counsel for the appellants, that these receipts and acknowledgments were made in error, as well as the original adjudication, and ought not to prejudice them; and that in fact a judgment has been rendered in the Probate Court, annulling the whole proceedings and ordering a sale of all the property at public auction.

Whether these instruments, if produced on the trial of that case, would have concluded the present plaintiffs, we are not now called on to inquire; but it appears to us clear, that the rights of the defendant in this case, cannot be affected by that judgment, and we must look at those instruments as if no such judgment had been rendered. It is as to him, *res inter alios acta*. Whatever might be the opinion of this court, as to the validity, as between the original parties, of the adjudication founded in error, and as to the subsequent ratification, admitting that they were equally made in error, it must not be overlooked that Murrell acquired his rights under the faith of these acts, which were all of public record, and nothing shows that he was conusant of the alleged errors. We are, therefore, of opinion, that in relation to the defendant Murrell, the plaintiffs are precluded, reserving, however, to Paul Foutelet his legal mortgage on the slave in question, in common with the other property of Joseph Foutelet. The existence of that prior mortgage, formed none of the grounds on which the injunction was obtained, and if it had, we have often ruled, that one hypothecary creditor has no right to arrest the proceedings instituted by another, against their common debtor, simply on the ground of priority.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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ON AN APPLICATION FOR A RE-HEARING.

Informalities and relative nullities, in the settlement of successions and disposition of property inherited by minors, must be taken advantage of by the minors themselves. As respects third persons, such transactions are valid until set aside.

Where minor heirs claim a restitution *in integrum*, they are bound to place matters as they were before. If they claim the property in nature or in kind, they must refund the amount received by them on account of it.

The mortgage acquired by a third person on dotal and paraphernal property of the deceased wife, after it is adjudicated by the Probate Court to the surviving husband, will be binding and conclusive against her heirs, if executed before any act is done by them to annul the adjudication.

Conrad, for the plaintiffs, presented the following petition and argument for a re-hearing :

“The counsel for the plaintiffs, under the firm conviction that the opinion of the court is erroneous, is impelled to solicit a re-hearing in this case. Had the court referred to the arguments and authorities adduced by him, if it were only to repel them, or to deny their applicability, neither self-love, nor a sense of duty to his client, would have been sufficiently strong to have prompted him to undertake so hopeless a task as that of obtaining a re-hearing. But when the court has not condescended to notice, in the slightest manner, the arguments adduced by him, and the authorities quoted in their support, he cannot but believe that, owing to the intricacy of the record, the circumstance of the case having been argued by brief, and the long absence of the judge on whom the examination of the record devolved, some oversight has been committed, and the opinion of the court too hastily formed.

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"The counsel for the plaintiffs relied, principally, on these principles, all of which rest on textual provisions of our laws, or are sustained by authorities that have never been controverted.

"1st. That every act of confirmation or ratification necessarily supposes something to confirm or ratify, some contract void or voidable, from want of power or capacity in the parties, or one of them, from some defect of form, or from some other cause. It is to cases of this nature that this court has in several instances applied the principle, that a voluntary execution of the contract, at a time when the party could legally ratify it, was tantamount to an express ratification of it, as in the case of a sale made by a minor ; or a *contract made* in error, but ratified or *voluntarily executed* after the error is discovered. But when an individual causes himself, by his own unauthorised act, to be put in possession of the property of another, alleging himself to be the proprietor of one half of it, and that the other half has been sold to him, not by the minor himself, but by a court of justice which had no earthly power to act in the matter, does a receipt by the real owner of the price of the half thus sold, convey a title to the purchaser, not only to that half thus pretended to be sold, but of the other half, for which there is not even a pretext or a shadow of title ? A person gets property to be adjudicated to him, as part of the community, which is found to be no part of it ; a more complete nullity cannot be imagined. His children, who were all minors when this occurred, grow up, and find him in possession of the property under this title ; they suppose all to be correct ; receive their half of the price of this pretended sale ; and it is contended that this receipt, manifestly the result of error in both parties, or of fraud in one and error in the other, is tantamount to a conveyance, not only of the half of which it was the price, but of the other half, which the pretended purchaser retained in his own right, though in fact he had a right to no part of it. Now the utmost extent to which this court has ever carried the doctrine of *implied ratification*, is that the receipt of the price

of a thing is equivalent to a sale of that thing. They never have pretended that the receipt of the price of one *undivided half* of a thing was equivalent to a sale of the whole, for that would be giving to the receipt not only the same effect as a sale, but greater, as by no rule of interpretation could a sale of the half be understood as a sale of the whole. When, in addition to this, it is recollected that there was no sale, either of the whole or of any part, (as the adjudication, it is admitted, was a mere nullity) and that the receipts, such as they were, were given in manifest error, induced by the acts of the person to whom they were given, we cannot conceive that, as between the parties themselves, the court would give them any other effect than as the mere evidences of money paid, which the person who paid it might be entitled to recover back. Now, as regards the rights of third persons, I have always thought that they acquired no other right than their vendor or mortgagor had to the property sold or mortgaged; that is, than the *titles* of the latter gave him on their face. A party may sometimes transfer to a third person a greater right than he himself had, but certainly no greater right than *his titles apparently gave him*; that is, in other words, where a title in the vendor is apparently good, in some cases the purchaser might not be affected by *extrinsic* circumstances of error, fraud, &c., which might affect the title to the property in the hands of the vendor, though even in that case this court has determined (and that too in relation to moveables) that when possession is obtained by fraud, third persons can acquire no greater rights than the possessor himself had. *Gasquet et al vs. Johnson*, 2 *Louisiana Reports*, 514. But it has never been contended, that if a person had himself no title to property, he could transfer a title to any one else. If a man causes my property to be adjudicated to him, without my consent, and in a case where no law authorises such a proceeding, he certainly has no title, and can convey none. If I afterwards, with a full knowledge of all these facts, confirm or ratify his title in proper form, he acquires a title, and can transfer it to a third person; but if the act of ratification

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is void as to him, that is, if on its face it is defective or insufficient, a third person, whether a purchaser or mortgagee, acquires no other or greater rights than the possessor himself. "*Nemo ad alium plus juris transferre potest quàm ipse habet.*" Louisiana Code, arts. 2427, 3268.

"2d. We contended that all these receipts were null, as they were not accompanied by the formalities required in settlements between a tutor and his pupil. On this point the authorities are so clear that no argument can make them clearer. I shall only observe, that it is not the settlement of his accounts as tutor alone which is declared to be null, unless accompanied by the formalities required by law, but every agreement. "*Toute Traité qui pourra intervenir.*" Art. 355. In fact the adjudication to the father in this case was a necessary voucher, "*price justificative,*" as it formed the basis of the whole settlement between the tutor and his pupil."

Bullard, J., delivered the opinion of the court.

A petition for a re-hearing has been presented in this case, in which the counsel for the appellant is pleased to remark, that "he cannot but believe, that owing to the intricacy of the record, the circumstance of the case having been argued by brief, and the long absence of the judge on whom the examination of the record devolved, some oversight has been committed, and the opinion of the court too hastily formed." In this statement there are two errors, which we feel bound to notice. The judge alluded to was absent, by permission of the court, four judicial days. Whether that be a *long* absence, is a matter of opinion upon which persons might very honestly differ. The legislature, by statute, authorises the judges to be absent themselves occasionally, during ten days, and the statute does not require the previous permission of the bar. The other error is in supposing that the examination of the record in this case devolved, exclusively, on the same member of the court. This intimation is wholly gratuitous. The record was repeatedly examined and read over by us all together, and considered with the

most scrupulous anxiety to ascertain the truth. As to matters of fact, it is not pretended that we committed any mistake.

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The case, in our opinion, turned upon the effect of certain acts of the plaintiffs, which, it was contended by the defendant, amounted to a ratification of the proceedings had in relation to the property left by their mother. The plaintiffs insist that these acts do not amount to a ratification, and are in themselves radically null: 1st, because there was nothing susceptible of ratification to which they referred; and 2ndly, that they are null, because they amount to an agreement, or *Traité*, between the minors, after they had attained the age of majority, and their tutor, not preceded by a rendition of accounts according to article 355 of the Louisiana Code.

I. The proceedings in 1817, in relation to the estate, were that an inventory was taken, in which all the property in possession of Foutelet, the father, at the death of his wife, was regarded as belonging to the community. The Court of Probates, on the advice of a family meeting, and with the concurrence of the under tutors of the plaintiffs, adjudicated the whole property to the tutor, at the price of estimation; at the same time, there is what purports to be a liquidation of the community. The land, with the improvements, was estimated at three thousand dollars. In the liquidation, the heirs of the wife are credited with the sum brought into marriage, as per contract; with "*the amount of the land,*" four hundred dollars; and with her portion of her father's estate, one thousand nine hundred and eighty-three dollars, and with one half the profits of the community. This gave to the heirs, after deducting the debts from the common mass, the sum of four thousand seven hundred and forty-two dollars, making six hundred and seventy-seven dollars and three-sevenths for each heir; and the husband credits himself with three hundred dollars brought by him into marriage, and one half the profits, one thousand nine hundred and thirteen dollars, amounting to two thousand two hundred and thirteen dollars. It is to be presumed, that the four hundred dollars represents the value of the land,

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independent of the improvements, and that the improvements belonged to the community, to wit: two thousand six hundred dollars.

This appears to us a judicial proceeding, in which the plaintiffs were represented by their under tutor, and, although, perhaps, clearly erroneous, certainly not so null, *ipso jure*, as not to be susceptible of ratification. If, on arriving at the age of majority, the children found it most advantageous to adhere to that arrangement and liquidation, and to receive the six hundred and seventy-seven dollars, with interest at five per cent. from 1817, they had a right to do so. One of them, Paul or Hypolite, has done so in the most explicit terms. In the act signed by him in 1832, he says expressly, that he approves the account or liquidation of the 10th February, 1817, and the adjudication of the property to his father, and claims only the six hundred and seventy-seven dollars, with interest.

But it is urged, that although a minor who, having arrived at the age of majority, receives the price of property alienated irregularly by his tutor, is considered as having tacitly ratified the alienation, yet this court has never before decided that when he receives the price of only one half, he is considered as having ratified the sale of the whole.

If the counsel had examined the record with more attention, he would have discovered that he had fallen into a manifest error in this particular. In the liquidation of 1817, the father credits himself with no part of the land or slaves belonging exclusively to his deceased wife. Her heirs are credited with the whole property inherited by her from her father, estimated in money, and that, instead of keeping one half of the value of the property in the inventory, he retains less than a third. That there was error in the original settlement and adjudication we readily admit; but we do not see in what consists the error in the ratification by Paul Foutelet, referring, as he does, expressly to the first proceedings, and approving the adjudication and the account rendered by his father.

II. It is further contended, that the discharge of the father, by these acts on the part of the plaintiffs, without any previous rendition of account by the tutor, is null, according to article 355 of the *Louisiana Code*. As an agreement by which the tutor is released from rendering any further account of his tutorship, it was perhaps null in the terms of that article; but what kind of nullity, whether *ipso jure* or only relative, is quite a different question. If absolutely and radically null, then it is null as relates to the tutor, as well as to the minor. But we do not consider this as belonging to that class of nullities. The father could not treat it as absolutely void; and, as respects third persons, it ought to be considered as valid until set aside. Such nullity was enacted for the benefit of the minor, and he is at liberty to avail himself of it, or not. If he claims a restitution *in integrum*, he is bound to place matters as they were before. How can the plaintiffs retain what they have received, and yet claim the property of their mother in nature? 3 *Duranton*, No. 639. *Merlin Repertoire, verbo Tutelle, section 5*.

But the next article of the Civil Code (356) declares that the action of the minor against his tutor, respecting the acts of tutorship, is prescribed by four years, to begin from the day of his majority. Whether such prescription would apply to the receipts in question, we are not called on to decide, but the opinions of *Duranton* and *Merlin* incline that way. But, at any rate, we consider them binding in relation to third persons, until declared null in some proceeding between the parties. Being acts of persons capable of contracting, they must stand until avoided or rescinded.

While this judicial proceeding, relating to the estate of Catharine Dublin, stood unreversed, without any knowledge of latent errors, Murrell, the appellee, acquired his right. The mortgage to him was soon after followed by the discharge, signed by two of the heirs, and recorded in the office of the parish judge, and by the positive and explicit ratification of the other heir, Paul. These acts had not been rescinded as erroneous, when the judgment was rendered in favor of Murrell. They were executed with a presumed notice of

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Informalities and relative nullities in the settlement of successions, and disposition of property inherited by minors, must be taken advantage of by the minors themselves. As respects third persons, such transactions are valid until set aside.

Where minor heirs claim a restitution *in integrum*, they are bound to place matters as they were before. If they claim the property in nature or in kind, they must refund the amount received by them on account of it.

The mortgage acquired by a third person on dotal or paraphernal property of the deceased wife, after it is adjudicated by the Probate Court to the surviving husband, will be binding, and conclusive against her heirs, if executed before any act is done by them to annul the adjudication.

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Murrell's right already acquired, inasmuch as his mortgage was matter of public record; and it would, in our opinion, be iniquitous to treat his mortgage as a nullity, upon the grounds assumed by the appellants.

The re-hearing, for these reasons, is refused.

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MILLAUDON vs. CAJUS, EXECUTOR, &c.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where the executor charges full commissions on the appraised value of the inventory of all the common property belonging to the husband and wife, and he is afterwards appointed her executor, he cannot charge commission on the value of certain slaves bequeathed by the husband to legatees, of which his testatrix only retained the mere usufruct until her death.

The counsel fees for settling an estate, cannot be charged to the portion in which the deceased had only a usufruct.

This case comes up on an opposition to the tableau of the executor, filed in the Court of Probates, of the estate of the late Madame Magnon.

The executor charged commissions and counsel fees on the value of certain slaves, which were bequeathed by the husband at his death to legatees, with a usufruct to Mrs. Magnon during life. The same person was executor of both estates. The value of these slaves was included in the inventory of the husband, and full commissions charged. The same charge is now claimed on their value as included in the wife's inventory, although she had but a usufruct interest in them.

9L	306
49	974
9	309
119	731
9	306
123	790

Millaudon, the transferee of these slaves, made opposition to the executor's account, on the ground that the charges were illegal. EASTERN DIST.
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The probate judge sustained the opposition, and the executor appealed.

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D. Seghers, for the appellant.

Macready, contra.

Bullard, J., delivered the opinion of the court.

The appellant, executor of the last will of the widow Magnon, complains of the judgment of the Court of Probates, by which the opposition on the part of L. Millaudon to the tableau of the executor was in part sustained, as it relates to his commissions and fees of counsel. The facts, so far as it is necessary to state them, in order to have a clear view of the present dispute, are that Mr. and Mrs. Magnon were in community; that on the death of the husband, many years ago, the whole estate was administered by Cajus, as the executor of his will; that the widow was entitled, under the will, to the usufruct during life of all the property left by the husband, which was bequeathed to certain persons as his heirs, subject to the usufruct; that Millaudon became the purchaser of two shares in the estate of the husband, and contributed his share of the charges of administration, and that full commissions were allowed the executor on all the property belonging to the community. Madame Magnon appointed the same person executor of her testament, by which her property, consisting of one half the community, was bequeathed to different persons from those who inherited from the husband. See same case, 6 *Louisiana Reports*, 222.

The question thus presented to the court, is whether the executor is entitled to charge commissions on that part of the common property belonging to Millaudon, by purchase from the testamentary heirs of the husband.

That the will of Madame Magnon conferred no authority on her executor to administer on property not belonging to

When the executor charges full commissions on the appraised value of the inventory of all the common property belonging to the husband and wife, and he is afterwards appointed her executor, he cannot charge commission on the value of certain slaves bequeathed by the husband to legatees, of which his testatrix only retained the mere usufruct until her death.

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The counsel fees for settling an estate, cannot be charged to the portion in which the deceased had only a usufruct.

her succession, appears to us quite clear. The heirs of the husband, though their interests were blended with those of the wife's, were not the co-heirs, but rather the co-proprietors of undivided property. They had a right to come to a partition, and to leave the share belonging to the wife, to be administered by the executor of her will.

But it is contended that Millaudon consented, as transferee, that the whole property, composing the common mass, should be sold by the register of wills, according to the terms and conditions prescribed by the advice of the family meeting, and that in pursuance of that consent, the executor was authorised to administer on the portion coming to Millaudon, and to charge his commissions. We consider the sale thus consented to, so far as it regards the heirs of Mr. Magnon, as a means of effecting a partition, and although the appellee may be bound to pay his share of the expenses attending the sale, it does not appear to us that it authorises the executor to charge commissions, as on a part of the estate administered by him.

In other respects, the judgment of the Court of Probates is not complained of, and it is, therefore, ordered, adjudged and decreed, that the decree be affirmed, with costs.

M'DONOUGH vs. COPELAND.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

A dismissal or discontinuance of a suit, will not be allowed to the plaintiff, in cases in which the parties are alternately plaintiffs and defendants, as in a *concurso*, and in the case of a reconvention.

Neither party to a suit is at liberty to discontinue or dismiss his action, which is not exclusively his own, and avert a judgment which his opponent has a right to obtain.

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So, where a party publishes a monition, under the act of 1834, for the assurance of titles acquired at judicial sales, and an opposition is filed to the homologation of the sale, the plaintiff in the monition cannot discontinue or dismiss his suit.

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The plaintiff became the purchaser of a parcel of ground in the parish of Orleans, sold at sheriff's sale, under a judgment and execution obtained by the New-Orleans Canal and Banking Company, and others, against one Robert Copeland, for the sum of nineteen thousand five hundred dollars.

The sale of this property took place on the 12th January, 1835. On the 24th day of April, 1835, M'Donough obtained from the clerk of the Parish Court, a monition under the act of 1834, for the assurance and protection of titles acquired at judicial sales, which was published according to law, calling on all persons to show cause, in thirty days, why the said sale should not be confirmed and homologated.

On the 22d May following, Copeland filed his opposition to the monition, alleging various defects in the sale sought to be confirmed, and grounds of nullity, and prayed that it be declared null and void.

The defendant had the case on his opposition to the monition set down for trial, to be tried in a summary manner. The counsel for the plaintiff moved to arrest the trial in this way, on several grounds, the last of which was, that his rights could not be litigated in this summary way. The court overruled his motion, and a bill of exceptions was taken.

The plaintiff then moved to discontinue his proceedings under the monition and abandon it, which was allowed by the court, to which the defendant excepted, and took an appeal.

Hennen, for the appellant.

Martin, J., delivered the opinion of the court.

The plaintiff, in order to be quieted in the title to a piece of property purchased at a sale under an execution against

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the defendant, obtained from the clerk of the court a general citation or monition, which he caused to be published in the newspapers, under provisions of the act of 1834, "for the assurance and protection of titles to purchasers at judicial sales."

The defendant thinking the sale had not been regularly conducted, and being desirous of availing himself of the speedy mode of relief, as provided for in the same act, relating to the perfection of titles acquired under such sales, filed an opposition to the homologation of the sale, and concluded with a prayer that it might be declared null and void.

The plaintiff opposed the setting down the case for trial, on the ground that the proceedings of the defendant were premature. His opposition was overruled, and he took a bill of exceptions. He afterwards moved the court, and obtained leave to dismiss or discontinue his action.

The defendant took an appeal from the decision of the court, allowing the dismissal or discontinuance of the case, as being illegal.

It is true, as a general principle, that the plaintiff may discontinue his suit on payment of costs. But this principle cannot be extended to cases in which the parties are alternately plaintiffs and defendants, as in a *concurso*, and in the case of a reconvention. Neither party is there at liberty to dismiss, or discontinue a suit or action, which is not exclusively his own, with a view to avert a judgment in the case, which his opponent has a right to obtain.

The legislature having seen fit to provide a speedy mode, by which purchasers at sheriffs' sale might test the validity of their titles acquired thereby, has subjected them to the equally speedy resort of the victims of forced alienations. The plaintiff, therefore, who seeks this summary relief, comes into court with an ill grace to send back his adversary to the tardy march of ordinary litigation.

The Parish Court, in our opinion, erred in allowing the dismissal or discontinuance of the case.

The conclusion at which this court has arrived on this part of the cause, renders it necessary that we should examine the plaintiff's bill of exceptions.

A dismissal or discontinuance of a suit will not be allowed to the plaintiff, in cases in which the parties are alternately plaintiffs and defendants, as in a *concurso*, and in the case of a reconvention.

Neither party to a suit is at liberty to discontinue or dismiss his action, which is not exclusively his own, and avert a judgment which his opponent has a right to obtain.

So, where a party publishes a monition, under the act of 1834, for the assurance of titles acquired at judicial sales, and an opposition is filed to the homologation of the sale, the plaintiff in the monition cannot discontinue or dismiss his suit.

His counsel has contended that the issuing and publication of the general citation, or monition, does not amount to the inception of a suit, but are merely preparatory steps in a proceeding required by law, before the plaintiff could cite his adversary, or come into court to ask for the homologation of the sale.

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The parish judge was clearly right in disregarding these objections. The act contemplates no special citation to the debtor, whose property has been sold. He must come into court within the delay fixed by the act, otherwise the homologation of the sale will take place as a matter of course, on the mere motion of the purchaser.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, the cause reinstated and remanded for further proceedings according to law, the appellee paying the costs of the appeal.

M'GUIRE vs. MEAD.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

A constitutional law which prohibits or takes away certain privileges and rights previously granted, or limits their exercise, causes *damnum absque injuria*; but if the law is unconstitutional, it can have no effect, and causes neither damage nor injury.

Legal interest does not run on a note given for a lottery privilege, from its maturity, when it is not protested; but only from judicial demand.

This is an action on a promissory note, executed by the defendant and another person to the plaintiff, as agent of the

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Free School Lottery, in the parish of Ouachita, for the sum of two thousand dollars, payable on the first day of January, 1834.

The defendant admitted the execution of the note, but averred that the consideration had failed, in consequence of which he was not bound to pay it.

He further averred, that said note was executed the 11th January, 1833, and payable the first of the January following, to the manager of the Ouachita Free School Lottery, for the privilege and right to draw said lottery; and that on the 1st of April, 1833, the legislature passed an act, prohibiting the drawing of said lottery, which rendered the obligation created by said note, null and void.

Upon these pleadings the parties went to trial. The evidence showed, that in the year 1828, the legislature passed an act, granting the privilege to the administrators of the Free Schools in the parish of Ouachita, to raise the sum of twenty-five thousand dollars by lottery. The managers appointed R. F. M'Guire their agent, to carry the lottery into effect. In January, 1833, the sum of money required not being raised, the agent sold out the right and privilege of the managers in said lottery to the defendant, who, with another, executed their promissory notes, including the one in suit, for the price of this privilege. The same year the legislature passed a law, declaring, "that the privilege of drawing lotteries, *heretofore granted*, should expire on the first of January, 1834," and making it highly penal for any person to sell lottery tickets within the state, thereafter.

The defendant refused to pay his notes, because of this privilege, for which he gave them, being taken away.

The parish judge was of opinion, the legislature had the right to pass the prohibitory law in question, and rendered judgment against the defendant for the amount of the note. The latter appealed.

J. Slidell, for the plaintiff.

Hennen, contra.

Martin, J., delivered the opinion of the court.

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The defendant being sued on his promissory note, opposed the plea of failure of the consideration for which it was given. Judgment having been rendered against him, he has appealed to this court.

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The defence set up, by which the consideration of the note is impeached, is as follows: The legislature authorised a lottery to be drawn, for the purpose of raising funds to support a free school in the parish of Ouachita. The act provided for selling out the right to draw the lottery, on the vendee's paying certain sums for the privilege. This right to the benefit of the lottery in question was sold to the defendant, who executed the note sued on to the plaintiff, as agent of the lottery, for the price of the purchase.

Three months after this transaction, the legislature of Louisiana passed a law, limiting the exercise of the right of raising money by lottery, even to those to whom the privilege had previously been granted, to the current year, (1833,) and prohibiting, under heavy penalties, the sale of any lottery ticket within the state, after the first day of January, 1834.

The defendant contends, that the last act of the legislature destroyed the right he purchased, or that it was materially injured thereby, and the consideration of the note given as the price, having failed in consequence of these acts, he is not bound to pay it.

The parish judge who tried the cause, was of opinion, that the decision of the case turned upon a legal or rather constitutional point, i. e., the constitutionality of the repealing act, which prohibits all lotteries in Louisiana, so far as respects privileges granted, and rights vested under them.

This court is of opinion, that the present case does not require a judicial decision, involving the constitutionality of the legislative enactment in question. We hold all our legal rights subject to the constitutional action of the legislative department; and the constitution of Louisiana contains an express declaration, that they cannot be affected or

A constitution-
al law which pro-
hibits or takes
away certain pri-

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vileges and rights previously granted, or limits their exercise, causes *damnum absque injuria*; but if the law is unconstitutional, it can have no effect, and causes neither damage nor injury.

Legal interest does not run on a note given for a lottery privilege, from its maturity, when it is not protested; but only from judicial demand.

impaired by it, while acting within the sphere of its constitutional powers.

If the prohibition or restriction contained in the act of the legislature, taking away this right to sell lottery tickets, is supported by the constitution, it caused *damnum absque injuria*; if unconstitutional it had no effect, and caused neither damage nor injury.

It appears to us, however, that the Parish Court has committed an error in allowing interest from the maturity of the note, which does not appear to have been protested for non-payment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of two thousand dollars, with legal interest from judicial demand, until paid, with costs in the Parish Court; and that he pay the costs of the appeal.

ST. VICTOR vs. DAUBERT.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Between the partners of a commercial firm, and a clerk who, in addition to his monthly salary, is to receive a share of the profits, there is no partnership created.

A clerk who is allowed a monthly salary and a share of the profits, is not thereby constituted a partner, and cannot bind the firm further than the express or implied consent of the partners authorise him.

So, a clerk entitled to a share of the profits of a commercial partnership, who collects funds of the firm, cannot retain them under pretence that

they are his share of the profits. He may be sued by the firm, and required to disgorge the sum thus received by him.

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The plaintiff alleges that the late firm of Durel and St. Victor established a grocery store in the lower faubourg of New-Orleans, and employed the defendant, at a salary of fifty dollars per month, to attend to its concerns, and the sale of the goods. He was further allowed one fourth of the profits of said concern, upon a liquidation of its affairs, if any should be made in the course of its business; that a stock of goods and articles was furnished said store amounting to nine thousand eight hundred and fifty dollars, which was committed to the care and superintendence of the defendant.

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The plaintiff alleges, that in the meantime the late firm of Durel and St. Victor was dissolved, and all the rights, credits and affairs of the co-partnership transferred to him, with full power to liquidate and settle the same; that finding the establishment in the lower faubourg unproductive, he directed the defendant to close and liquidate its concerns; that all the stock in trade was, in pursuance of this determination, sold at auction, and instead of profits being made, he has not yet been reimbursed the capital; that the defendant has collected one thousand seven hundred and seventy-eight dollars, which he retains and refuses to pay over, under the pretence that this sum belongs to him as his share of the profits. The plaintiff prays judgment for this sum, with interest and costs.

The defendant excepted to the plaintiff's right of action as premature.

The Parish Court sustained the exception on the following grounds:

"It appears to the court that the action in this case cannot be maintained, it being a suit for a specific sum of money, alleged by the plaintiff, one of the partners, to be due by the defendant, another partner, without showing that a settlement had been had, or applying for one judicially, if an amicable settlement had been refused."

The court predicates its decision on a number of decisions of the Supreme Court.

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1. That until the account of partnership is settled, one partner has no right of action against another. 2 *Louisiana Reports*, 451.

2. In all actions for the settlement of partnership accounts, all the partners, or their representatives, must be made parties. 6 *Martin, N. S.*, 188.

3. A partner, if sued by another, may, under the general issue, show that the plaintiff cannot recover; he can only claim a settlement. 7 *Martin, N. S.*, 284.

4. One partner cannot sue another for the partnership funds, until a settlement is had. 8 *Martin, N. S.*, 281.

From this judgment the plaintiff appealed.

Murphy and Grailhe, for the plaintiff, made the following assignment of errors:

1. The judgment of the Parish Court is erroneous in considering the defendant as a partner. The suit is for a specific sum of money collected by the defendant as clerk, and not as a partner of the firm.

2. The plaintiff owned all the capital put in this store, and the defendant acted as a clerk, or mandatory, with a salary per month, and to have one fourth of any profits after liquidation.

3. The defendant could be considered in no other light than as an agent or clerk, and as such, bound to account and pay over to his principal whatever sum he might have received on his account. *Louisiana Code* 29, 74. 8 *Martin, N. S.*, 172.

Canon, contra.

Martin, J., delivered the opinion of the court.

The plaintiff and another person being partners in trade, established a store and engaged the defendant at a salary of fifty dollars per month, to attend to the business of the store and sale of the goods, and further promised him one fourth part of the profits that might be made.

The plaintiff afterwards purchased the interest of his

co-partner, and finding the concern unprofitable, shut up the store, after having made a sale of the goods on hand. The defendant was charged with the collection of the debts. After having collected the sum of one thousand seven hundred and seventy-eight dollars, the defendant retained it on the ground that he had a right to do so, until the plaintiff accounted to him and paid over his share of the profits.

The present suit was instituted to recover the sum thus remaining in the hands of the defendant.

The plaintiff's demand is resisted, on an allegation that the parties were co-partners, and neither of them could sue the other, except for a settlement and recovery of the balance.

The Parish Court dismissed the suit as premature, and the plaintiff appealed.

Whether a participation in the profits of a commercial house creates a liability to the creditors of the concern, and to what extent or amount, is a question which this case does not appear to present.

Between the partners of a commercial house and a clerk who, in addition to his monthly salary, is allowed, as a further stimulus to his industry, a share of the profits, we have no hesitation in deciding, that this allowance does not constitute him a partner. It gives him no additional control over the affairs of the partnership, nor does it authorise him to bind the house, or firm, further than by the express consent of the partners, or an implied consent resulting from the nature of his employment.

The person thus employed and rewarded, has no right to retain the funds of the house, which employed him to collect them. They must be supposed, until the affairs of the partnership are liquidated, to be provided for, and required to meet its engagements, and afterwards to reimburse the partners for their advances, before a division of the profits is made.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and the cause remanded for new proceedings, the appellee paying the costs of the appeal.

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Between the partners of a commercial firm and a clerk, who in addition to his monthly salary, is to receive a share of the profits, there is no partnership created.

A clerk who is allowed a monthly salary and a share of the profits, is not thereby constituted a partner, and cannot bind the firm further than the express or implied consent of the partners authorise him.

So, a clerk, entitled to a share of the profits of a commercial partnership, who collects funds of the firm, cannot retain them under pretence that they are his share of the profits. He may be sued by the firm, and required to disgorge the sum thus received by him.

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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Before the bill of lading comes into the hands of the consignee, the shipper may, if he chooses, modify the contract between him and the carrier, by a written declaration that a part of the cargo was not in good order, as specified in the bill of lading.

Where one of the parties was called as a witness by the adverse party, and his answers on cross-examination objected to as irrelevant and inadmissible: *Held*, that much latitude is allowed in such cases, especially when the witness shows he is interested in the question, and that his opinions may be tested by his own actions in apparent contradiction with them.

This is an action for damages. The plaintiffs allege that a firm in Liverpool shipped to their house in New-Orleans, a quantity of hoop and sheet iron, worth the sum of two thousand eight hundred and sixteen dollars and ninety-five cents, on board the ship Chieftain, in good order, which was so damaged, by the negligence and bad stowage of the master and officers of that vessel, that it was sold, on landing at the port of New-Orleans, for only the sum of six hundred and fifty-two dollars and ninety-nine cents, making a clear loss to the plaintiffs of two thousand one hundred and sixty-three dollars and ninety-six cents, for which they pray judgment against the master and owners of the said vessel.

The defendants admitted the shipment of the iron on board their vessel, as per bill of lading annexed, and which they have delivered to the plaintiffs, but deny that it was in good order when shipped, and any further damage it may have sustained was without their fault, and not by negligence or any other misconduct on their part. They deny all the other allegations in the petition, and pray judgment for their freight in reconvention.

Upon these issues the parties went to trial. The bill of lading was first offered in evidence; its tenor is as follows:

"Shipped in good order and condition, by John Bibby & Co., of Liverpool, in and upon the good ship or vessel called the Chieftain, whereof J. Mooney is master for the present voyage, &c., and bound for New-Orleans, 26 bolts of copper, 494 bundles and 241 boxes of iron, to be delivered in like good order and condition at New-Orleans, (the dangers and accidents of the seas and navigation, of whatever nature and kind, excepted,) unto Messrs. John Hall & Co., or their assigns, they paying freight, &c. Dated at Liverpool the 6th December, 1833."

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The other evidence is detailed in the opinion of the parish judge, which is given below :

"That although a bill of lading is considered, in commercial law, as strong *prima facie* evidence, the obligation it contains may be diminished or varied by other agreements entered into by the parties ; that in the present case, although the bill of lading is signed by the master of the ship Chieftain, stating the iron of the plaintiffs to have been shipped in good order, still, that statement is contradicted by a written declaration from the shippers at Liverpool, (the master and shipper being the parties to a bill of lading,) that some of the iron was a little rusty, though not in an unmerchantable condition, and that the shippers exonerate the said master from any loss arising from his signing the bill of lading, without a clause for part of the iron being rusty, as aforesaid."

2d. "That from the testimony of several witnesses, and also by a port warden's certificate, the vessel was properly stowed."

3d. "That it is in proof that the ship Chieftain, on her passage from Liverpool to this place, experienced very boisterous weather ; that she had her covering boards split, thirteen of her stanchions, and her bulwarks carried away in a gale ; that a great deal of water got into her, and damaged the cargo, and especially the iron ; and that the damage done to the iron is, by the port warden's certificate, above alluded to, attributed to the water blown through the skin of the ship."

4th. "That these facts easily explain how the plaintiffs' iron, even if it had not been rusty at all when shipped, could have

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become so without any neglect or want of care on the part of the master."

5th. "That the damage being the result of the dangers of the sea, for which the master is not responsible, the plaintiffs cannot recover on this action."

6th. "That the amount of freight stipulated by the bill of lading, is shown to be twenty-four pounds fifteen shillings and ninepence, which the defendants have pleaded in reconvention."

"It is ordered, adjudged and decreed, that judgment be entered in favor of the defendants, against the plaintiffs, for the sum of twenty-four pounds fifteen shillings and ninepence, or one hundred dollars and sixteen cents, and costs of suit."

The plaintiffs appealed.

Sterrett, for the plaintiffs.

1. The judgment is manifestly erroneous, being contrary to law, and the evidence in the case.

2. The court erred in allowing the letter of Bibby & Co. to be read in evidence, and to contest the bill of lading: it is *res inter alios acta*.

3. But even if it were legally admissible, Bibby & Co. declare the iron to be merchantable; all the witnesses examined on that point, declare the contrary when it was landed.

4. The port warden's certificate does not make mention of the iron, the subject matter of this suit.

5. The iron might have been well stowed, and yet the injury may have arisen from the salt being placed on the top of it.

6. The evidence does not sufficiently show the damage to have been occasioned by the dangers of the seas, but by the salt.

7. The ship is liable to the plaintiffs under all the circumstances, and if the captain was induced into error by Bibby & Co., the owners have their recourse against them.

Strawbridge, contra.

Bullard, J., delivered the opinion of the court.

The plaintiffs in this case, allege that John Bibby & Co., of Liverpool, shipped on board the ship Chieftain, of which the defendants are master and owners, a quantity of hoop and sheet iron consigned to them; that the iron was shipped in good order and well conditioned, but that owing to carelessness, negligence, bad stowage, or insufficiency of the vessel, the iron was damaged on board said ship, and on her arrival was sold, under the inspection of the port wardens, for a trifling sum, to their damage two thousand one hundred and sixty dollars and ninety-six cents; for which sum they pray judgment.

The defendants, in their answer, admit the shipment of the iron, but they deny that it was shipped in good order; but aver that it was rusted at the time it was shipped, and that if further damage has been done, it was not owing to their negligence, but to the dangers and accidents of the sea. They deny all other allegations in the petition, and claim, in reconviction, the amount of freight stipulated by the bill of lading.

Judgment was rendered in favor of the defendants for the freight, and against the pretensions of the plaintiffs, and they appealed.

On the trial below, the defendants offered to read in evidence a paper signed by Bibby & Co., the shippers, bearing date a few days after the bill of lading, in which they declare, that in consideration of the captain having signed their bills of lading, without a clause for a part of the iron being a little rusty, they exonerate him from any loss arising from his doing so, but stating, at the same time, that the iron was in a merchantable condition. The introduction of this evidence was objected to, on the grounds that it went to contradict the bill of lading; that it was an agreement between individuals not parties to the suit, and not binding on the plaintiffs, and that it was made after the signing of the bill of lading, and after the property had vested in the plaintiffs. These objections being overruled, the plaintiffs took a bill of exceptions.

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Before the bill of lading comes into the hands of the consignee, the shipper may, if he chooses, modify the contract between him and the carrier, by a written declaration that a part of the cargo was not in good order, as specified in the bill of lading.

The original parties to a bill of lading, are the shippers and the captain, or carrier. The consignee is designated by the shipper, but his right is not complete, at all events, before the bill of lading comes into his hands. He is presumed to be the agent or factor of the shipper. If, before the bill of lading comes into the hands of the consignee, the shipper choose to vary, or modify the contract between himself and the carrier, or to acknowledge that there was error as to the description of the goods, in the bill of lading signed, we do not perceive how the consignee has a right to complain. The evidence in the case does not show us at whose risk was the iron during the voyage, whether of the consignor or the consignee, and without such evidence it is presumed to be at the risk of the owner, and that the consignor was the owner until delivery; but whether Bibby & Co. be considered as the owners of the iron, or as the mere agents of the plaintiffs, it does not appear to us material. In either case their acts in relation to the shipment, must be considered as binding on the plaintiffs. The same reasoning applies to the testimony of M'Millen, which was objected to on similar grounds, and we are of opinion, that the court did not err in admitting the evidence.

Where one of the parties was called as a witness by the adverse party, and his answers on cross-examination objected to as irrelevant and inadmissible: *Held*, that much latitude is allowed in such cases, especially when the witness shows he is interested in the question, and that his opinions may be tested by his own actions, in apparent contradiction with them.

There is a further bill of exceptions which we are called on to notice. It appears that while John D. Bein, one of the parties, plaintiffs in this case, was on his cross-examination as a witness, in a case tried about the same time, and the evidence in which was admitted in this case by agreement of parties, the defendants' counsel proposed to question him as to the facts relating to a settlement made between Peuch & Bein and an insurance company, with regard to other goods damaged on board the same ship, on the same voyage. This was objected to on the ground that the evidence was irrelevant and inadmissible, but permitted by the court. We are of opinion the court did not err; much latitude is allowed in a cross-examination, especially when a witness shows that he has an interest in the question. The witness in this case having stated it as his opinion, that the iron was damaged in consequence of bad stowage, and not by perils

of the sea, might very well be asked whether he had not claimed from an underwriter, for damage done to another part of the same cargo, as having been occasioned by perils of the sea; not that the evidence was at all material in this case, but that the value of the opinions of the witness might be tested by his own actions, in apparent contradiction with those opinions.

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Upon the merits, the case appears to be with the defendants. The port wardens certify that the hatches of the ship were well secured, and the cargo well stowed; a professed stevedore testifies that the cargo was well stowed, and not in such a way as that the salt was in contact with the iron. Great damage is shown to have been done to the ship by stress of weather, during a winter voyage; and although there is among the witnesses some discrepancy of opinion as to the cause of the damage done to that part of the cargo, in controversy in this case, yet we concur in the conclusion at which the court below arrived, that it is sufficiently shown not to have resulted from the want of care or negligence of the captain and crew, and that the defendants are not liable.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

MINOR ET AL VS. LANBELLE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The proceedings of the court below will be considered as regular, until the contrary appears; and where a case is stated to be *on trial* of a Friday, it will be presumed to have commenced the day preceding being that on which it was fixed for trial.

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The appellant cannot assign for error apparent on the face of the record, that the judgment was signed before the expiration of three judicial days from its rendition.

In this case the plaintiffs had obtained an injunction against the defendant, to stay an order of seizure and sale she was prosecuting against certain mortgaged property, in their possession.

At the October term, 1835, of the District Court for the parish of Ascension, the following proceedings were had in this cause :

“Tuesday, October 13th, 1835. It is ordered that this suit be set for trial on Thursday next.”

“Friday October 16, 1835. This case being on trial, the defendant, widow Lanbelle, introduced the following testimony.”

“On the 17th October 1835. The court this day rendered final judgment in this case, to wit: ‘The plaintiffs in injunction having been called, and not appearing to prosecute their suit, &c., it is ordered that the injunction herein be dissolved at plaintiffs’ costs; and that the principals and surety in the injunction be condemned *in solido* to pay interest on the sum enjoined, at the rate of ten per centum per annum, and twenty-five per centum damages for the trouble and expense, to which the party enjoined has been subjected.’”

Judgment signed the same day.

The plaintiffs in injunction appealed from this judgment.

The clerk of the court below certified in his return to a writ of *certiorari*, that the words found in the transcript of the record, at page 23, “this case being on trial, defendant, widow Lanbelle, introduced the following testimony,” were not to be found on the minutes of the court, &c., but were inserted in the transcript by mistake.

T. Slidell, for the plaintiffs, assigned the following points, as errors on the face of the record :

1. This cause was tried on a different day from that for which it was set down for trial.

2. The judgment was signed before the expiration of three judicial days from that on which it was rendered in court.

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J. Seghers, for the defendant.

1. In this case there is neither a statement of facts, bill of exceptions, evidence, nor any other matter by which the court can review or examine the judgment. The appeal should therefore be dismissed. 3 *Martin*, N. S., 89. 5 *Ibid.*, 84. 7 *Ibid.*, 237.

2. The appellant cannot assign as error, that judgment was signed too soon, or before the lapse of three judicial days from the time it is rendered. By appealing he has chosen to consider it as final. 7 *Martin*, N. S., 234. 4 *Martin's Reports*, 190.

3. The trial of the case began on Thursday, and ended on Friday following, in the court below; but on whatever day the cause may have been tried, cannot be alleged as error in law; it is mere matter of fact. Nothing can be assigned as error apparent on the face of the record, except matters of law. See *Code of Practice*, article 897. 11 *Martin's Reports*, 558.

Bullard J., delivered the opinion of the court.

The appellant relies on an assignment of errors, apparent on the face of the record: 1st. That the cause was tried on a different day from that for which it was set, and, 2d. That judgment was signed before the expiration of three days from the one on which it was rendered.

I. It appears that the case was set for trial on Thursday, and on the following day, it is stated in the record, that "the case being on trial, the widow Lanbelle introduced the following testimony." Whether the trial commenced on the day for which it was fixed, is not shown; but the judge states in his judgment, that the plaintiffs in the injunction were called, and failed to prosecute their suit. We are bound to believe that the proceedings were regular, until the contrary appears, and the case being on trial on Friday, we

The proceedings of the court below will be considered as regular, until the contrary appears; and where a case is stated to be on trial of a Friday, it will be presumed to have commenced the day preceding being that on which it was fixed for trial.

The appellant cannot assign for error on the face of the record, that the judgment was signed before the expiration of three judicial days from its rendition.

EASTERN DIST. must presume that the trial commenced on the day previously fixed, according to the previous order of the court.
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II. The question raised by the second assignment, has been settled by this court, in the case of *Weathersbee vs. Hughss. 7 Martin, N. S., 234.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

LALLANDE vs. PRESIDENT AND DIRECTORS OF THE LOUISIANA
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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the president and directors of a company are appointed commissioners to perform a certain trust, they act in the latter capacity alone, and are responsible for their acts as commissioners, after their offices of president and directors have expired.

Where commissioners are to open books of subscription for stock of a company, on a certain day, and keep them open until the subscription is filled, the time within which they are to keep the books open is unlimited, except as to its commencement, and the commissioners are responsible, until the subscription is filled according to the charter.

The writ of *mandamus* is provided for, in all cases where the law has assigned no relief by the ordinary means, and where reason and justice require some mode of redressing a wrong.

This is an action by an applicant to become a stockholder in the Louisiana State Marine and Fire Insurance Company, against the president and directors of the late Louisiana State Insurance Company, acting as commissioners of the former company, for a *mandamus*, compelling them to show

cause, why the subscriptions received by them should not be declared null and void, and the books of the new company be re-opened, and the subscriptions again received by them, according to the charter or act of incorporation.

The defendants pleaded an exception to the plaintiff's petition, in manner as set forth in the opinion of the court.

The facts of the case are contained in the following opinion of the district judge, who tried the cause in the first instance :

"On 27th March, 1835, an act was passed incorporating the Louisiana State Marine and Fire Insurance Company, with a capital of three hundred thousand dollars, to be divided into three thousand shares.

"That subscriptions for the said three thousand shares shall be opened at New-Orleans, in the month of April next, under the superintendence of the president and directors of the Louisiana State Insurance Company, and shall continue open until the whole of said number of shares shall have been subscribed."

"The petition alleges that public notice was given ; that on the day the subscription was to be made, the petitioner and a number of persons attended to subscribe, and offered, and were ready to subscribe and pay the instalment, but were not permitted to do so ; that books were not opened for subscription, as required by law ; that no quorum of directors attended.

"That John K. West, the president, at the moment fixed by public advertisement, and without announcing that the books were opened for subscription, took aside the books intended to receive the subscriptions, and either on his own account, or as pretended agent for others, subscribed for almost the whole amount of the capital stock, without offering to all persons present the least opportunity to subscribe ; that the instalment of twenty dollars per share was not paid as required.

"The petition charges that fraud and deception have been practised, contrary to the true intent and meaning of the act of incorporation, to deprive petitioner and others of the right of subscription.

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"The petition alleges that the subscriptions are void, and calls upon the court so to decree, and to *mandamus* the president and directors to open the subscription books, and receive the subscription of plaintiff and others, as prescribed by the act.

"There is a plea in the nature of an exception, which sets out that the charter of the Louisiana State Insurance Company expired on the 1st May, 1835; that defendants are not bound and cannot act under the authority of the second section of the act of 27th March, 1835; that the books were to be opened in April, which is now past.

"There are, doubtless, cases where to save pre-existing rights, courts would be justified to supply deficient and imperfect legislation, but the duty is a delicate and important one, and unless the case be a very clear one, and most generally, unless there be some already existing right, or some imperious necessity, the judiciary ought not to interfere, or attempt, or appear to grasp at legislative power. There are cases also, where, when parties apply for and are constituted, on their own application and consent, agents for given duties, they would not be permitted to abstain from the fulfilment of the duty. But I do not consider the present such a case. The right claimed by plaintiff is one which he has only in common with all his fellow citizens. It is not of that precise, fixed, vested and tangible character as to be the subject of property, and therefore essentially coming, by its nature, under judicial protection, in such a way and to such an extent as to authorise a court to supply defective legislation, or rather, as its principle would be considered, maintain and enforce a vested interest and property."

The district judge was of opinion this was a case in which he could grant no relief, and dismissed the petition on the exception pleaded. The plaintiff appealed.

Grima, for the plaintiff, contended:

1. Although the charter of the Louisiana State Insurance Company expired on the 1st May, 1835, the president and directors of said company were still, as commissioners, respon-

sible for their acts, under the second section of the act of 27th March, 1835, by virtue of which they acted.

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2. The court below was bound to examine into the nature of the charges contained in the appellant's petition, and could not do so upon the exception, nor pronounce upon the rights of the appellant, without hearing the case on its merits.

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3. The act of 27th March, 1835, is clear and without ambiguity, and if the duties prescribed by the commissioners have not been fulfilled by them, their acts are void, and should be declared void.

4. If the law be doubtful, or if there was no express law, the court was bound to proceed and decide according to law

Eustis, for the defendants.

Bullard, J., delivered the opinion of the court.

The petitioner in this case, alleges that the defendants being at the time the president and directors of the Louisiana State Insurance Company, were constituted a board of commissioners to superintend the opening of the books for the subscription to the capital stock of a new corporation, created by act of the legislature of the 27th March, 1835, styled the Louisiana State Marine and Fire Insurance Company; that they accepted that trust, and gave public notice in the newspapers that the subscription would be opened on the 6th of April; that the plaintiff, with many others, were present at the time appointed, and offered to subscribe, and pay, at the time of subscribing, twenty dollars on each share, as required by the charter, but that their offer was refused. He further alleges, that John K. West, one of the commissioners, at the very moment fixed by the advertisement, and without announcing that the books were opened for subscription, took aside the books, and either for his own account, or as the pretended agent of others, subscribed for almost the whole amount of the capital stock, without offering to all persons present the least opportunity to subscribe; that the twenty dollars per share, as required by the charter, was not paid. He further alleges, that the books were not regularly

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opened, according to the true intent and meaning of the charter; that a quorum of the commissioners was never present to superintend the subscription, until after the president announced that the subscription was filed and the books closed. He alleges that he has been greatly injured by this illegal conduct of the commissioners, and deprived of a right given him by the charter; that fraud and deception were employed, contrary to the true intent and meaning of the act of incorporation, to deprive him and others of that right; that the subscriptions so made on the 6th of April are null and void.

The petition concludes with a prayer that a writ of *mandamus* may issue, commanding the defendants to open the books, and proceed to receive the subscription of the capital stock, according to the charter, and to show cause why the subscription thus made should not be annulled, and for such further relief as the nature of the case may require.

To this action the defendants set up as a peremptory exception, that the charter of the Louisiana State Insurance Company expired by its own limitation, on the 1st of May, 1835; and that they were not bound to act, and cannot act after that time, under the authority given by the second section of the act to incorporate the subscribers to the Louisiana State Marine and Fire Insurance Company, approved on the 27th March, 1835, because, by the express provision of said charter, the books of said company could only be opened in the month of April, 1835, and under the superintendence of the defendants, as president and directors of the Louisiana State Insurance Company.

This defence, when analysed, amounts to this, as we understand it, that the defendants, as commissioners under the new corporation, are *functi officiis*, because the old corporation, of which they were president and directors, had ceased to exist at the time they filed their answer; that being no longer president and directors, they are no longer commissioners under the new charter; and that the time for opening the books has past, and they have no longer any authority to act.

We may assume it as an undoubted proposition, that in the present suit the defendants do not represent, in any manner, either of the two corporations. They stand before the court as individuals who were appointed by law to perform a certain trust, and who, according to the allegations in the petition, and not denied, assumed to act in fulfilment of that trust, by giving public notice within the time specified in the charter. It is true, they were the president and directors of the Louisiana State Insurance Company, but when they assumed to act under this appointment, they did not act in that capacity, but as commissioners to receive the subscription of the capital stock of a new company to be formed, of which the future subscribers were to be the corporators. No judgment is asked against either of those corporations, but against the persons who assumed to act as commissioners, and to compel them to proceed in the performance of their duties, according to the true intent and meaning of the act of the legislature. If the defendants had been appointed by name, describing them as for the time being, president and directors of a corporation about to expire, it would not have been doubted that the trust was personal to them, and the addition of their existing quality as mere *descriptis personarum*.

The second section of the act incorporating the subscribers to the Louisiana State Marine and Fire Insurance Company, provides that subscriptions for the capital stock, three thousand shares, shall be opened at New-Orleans, in the month of April next, under the superintendence of the president and directors of the Louisiana State Insurance Company, and shall continue open until the whole of said number of shares shall have been subscribed. *Acts of 1835, page 59.* It appears to us clear, that while acting under this appointment, the defendants could not bind the stockholders of the company of which they were president and directors, and that the two corporations are wholly independent of each other. The fourth section provides that the subscribers to the said insurance company, their successors and assigns, are created a body politic. If there were no subscribers, there

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Where the president and directors of a company are appointed commissioners to perform a certain trust, they act in the latter capacity alone, and are responsible for their acts as commissioners, after their offices of president and directors have expired.

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Where commissioners are to open books of subscription for stock of a company, on a certain day, and keep them open until the subscription is filled, the time within which they are to keep the books open is unlimited, except as to its commencement, and the commissioners are responsible, until the subscription is filled according to the charter.

The writ of *mandamus* is provided for, in all cases where the law has assigned no relief by the ordinary means, and where reason and justice require some mode of redressing a wrong.

could be no corporators and no corporation, and the commissioners were to open the books for the purpose of receiving subscriptions, and to require each subscriber to pay, at the time of subscribing, twenty dollars on each share, and secure the payment of the balance.

The latter part of the exception set up by the defendants, assumes that the time within which subscriptions could be received, was limited to the month of April, 1835, and that after that period, the commissioners could no longer open the books. The charter, as we have seen, requires that the books shall be opened in April, but it requires, at the same time, that the subscriptions shall be kept open until the whole of the number of shares shall have been subscribed. We cannot doubt that the commissioners were authorised to act after the month of April, if they had commenced to act within that month, and the subscription was not filled. The time within which they are authorised to keep open the subscription is unlimited, except as to its commencement, which was required to be in April. If they did not cease to be commissioners when they ceased to be the president and directors of a corporation which had expired, they continued, in our opinion, to be so until the subscription was filled.

It will be perceived, that we confine ourselves entirely to the question of law presented by the exception, without inquiring into the merits of the controversy, and whether any, and if so, what remedy remains to the plaintiff, supposing all the facts alleged by him to be true. The writ of *mandamus* which is demanded in this case, is provided by the Code of Practice, in all cases "where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong, or an abuse of any nature whatever." *Article 830*. "It may be directed to public officers, to compel them to fulfil any of the duties attached to their office, or which may be legally required of them." *Article 834*. Whether the plaintiff be entitled to the relief sought by him, is a question which we are not now called on to decide; but we are of opinion, that there is nothing in the exception which exempts the defend-

ants from an inquiry into the manner in which they have executed the trust reposed in them, and that the court erred in sustaining it.

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April, 1836.

DUFOUR
vs.
MORSE ET AL.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; that the exception be overruled, and the case remanded for further proceedings, according to law, and that the defendants pay the costs of appeal.

DUFOUR vs. MORSE ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where the notice of protest is left with a black man, who appears to be a servant in the house of the endorser, and who stated at the time that the latter was still in bed, it is insufficient to bind the endorser.

The fact of the endorser taking a mortgage from the maker of a note, to indemnify him against loss, does not dispense with due and legal notice of protest for non-payment, to be given by the holder.

This is an action against the widow and only son and heir of the late Nathan Morse, to render them liable for the amount of a promissory note, endorsed by the deceased, and which became due and payable after his death.

The defendants admitted the signature of Morse, and their heirship; but denied that they were liable, for want of legal notice of protest.

The parties went to trial on this issue.

The evidence showed that the note in suit fell due, and payment was demanded of the maker, on the 2d day of August, 1834, and it was protested the same day for non-payment.

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April, 1836.

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vs.
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The notary's clerk testified, that on the 4th of August, (the 3d being Sunday,) he went early in the morning to the dwelling house of the late Col. Morse, where his widow and son then resided, to serve the *notice* of protest of the note in question; that he was informed by a black man, a servant in the house, that all the white persons were asleep. He then left the notice with the black man, requesting him to deliver it either to Mr. Morse, the son, or to Mrs. Morse, the widow of the deceased.

He further states, that he found this black man standing before the door, where he had knocked several times for a long while. This man seemed to be a servant of the house; he was the only person who came after the witness had knocked at the door.

It further appeared, that Col. Morse, when he endorsed the note, took a mortgage on property of the maker, to indemnify him against any loss on account of the endorsement.

The parish judge deemed the notice of protest insufficient, and gave judgment for the defendants. The plaintiff appealed.

J. Seghers, for the appellant.

Martin, J., delivered the opinion of the court.

This is an action on a note, endorsed by the late N. Morse, deceased. The suit is brought against the widow and heir of the deceased, to render them liable for his endorsement.

The defendants resisted the demand, on the ground that there was no legal notice of protest. Judgment was rendered in their favor, and the plaintiff appealed.

Where the notice of protest is left with a black man, who appears to be a servant in the house of the endorser, who stated at the time, that the latter was still in bed, it is insufficient to bind the endorser.

The evidence shows, that the clerk of the notary who protested the note, called very early on the next morning, at the house of the defendants, and left the notice of protest with a negro boy, who told him they were still in bed. The plaintiff's counsel has not contended, that this was a legal notice, especially as a witness has deposed, that there was not at that time a black servant in the house.

He has, however, shown, that the maker of the note, at the time he obtained Morse's endorsement, gave him a mortgage, in order to indemnify him, in case he sustained any loss in consequence of his endorsement.

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It is contended, that as the endorser was secured against any loss, there was no necessity of giving him any notice. This may be the case where a creditor is secured against the effect of the endorsement by the receipt of a sum of money, other notes, bills or property. In such a case he may be viewed as having undertaken to apply the money he received (or that which the notes, bills or property may afford him the means of obtaining) to the discharge of his conditional obligation. He may be viewed as an agent who has undertaken to pay, and though, therefore, cannot be said to be disappointed, if his principal, relying on the performance of the obligation of his friend, takes no further steps for the payment of the note.

But here the endorser received nothing but a mortgage for his indemnification. He might well expect that the duty and interest of the maker would prompt him to prevent the protest of the note. He knew that the only obligation he had incurred towards the holder of the note, was to pay it in case the drawer did not, and after being duly and legally notified of the failure and neglect of the maker to take it up.

The fact of the endorser taking a mortgage from the maker of a note, to indemnify him against loss, does not dispense with due and legal notice of protest for non-payment, to be given by the holder.

Towards the latter, the endorser incurred no obligation. The mortgage was a useless paper in the hands of the defendants. The inchoate and conditional obligation which resulted from the endorsement, never became perfect and absolute. The endorser, nor those who represent him in this case, have not suffered, nor can they now suffer any injury, for the indemnification of which they could resort to the mortgage. The defendants are precisely in the same situation, as they would be if no mortgage had been taken.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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HAMPTON'S
 HEIRS
 vs.
 BARRETT.

HAMPTON'S HEIRS vs. BARRETT.

9	336
118	780

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The pendency of a suit in the United States District Court, to enforce a demand founded on a contract of sale, the validity of which is attacked, and its rescission sought, cannot be pleaded as an exception to another suit in the state court, between the same parties, for a similar demand, founded on the same contract of sale.

This is an action to recover two annual instalments of interest, amounting in all to twelve thousand dollars, which became due the 1st January, 1835-6, on the sum of one hundred thousand dollars, being the price of a sugar plantation and slaves sold by General Wade Hampton to one Le Roy Pope, payable in twenty years, and drawing an annual interest in the mean time. The plaintiffs allege they are the widow in community and heirs of the late General Hampton, and that the defendant, Thomas Barrett, has purchased the premises from Pope, and assumed the original obligations and payments, by which the latter was bound.

The defendant pleaded an exception to the plaintiffs' suit, in which he averred, that proceedings against him had been previously commenced by the ancestor of the plaintiffs, in his lifetime, in the United States District Court, for the Eastern District of Louisiana, for the two first instalments of interest due on the same debt, to which he had made a real and valid defence, which suit was still pending, and that he could not be required to answer to the present action, and which he prayed might be dismissed.

General Hampton having died, and his heirs residing in this state, brought the present suit, for the next instalments of interest, which became due in the state court, in January, 1836.

The suit pending in the United States District Court, and pleaded as an exception to this, was commenced by General

Hampton, in his lifetime, then a resident of South Carolina, on the 19th of April, 1834, claiming the two first instalments of interest, on the contract of sale in question.

EASTERN DIST.
April, 1836.

The defendant, Barrett, in his answer, avers the land which was the object of the sale, did not belong to Hampton; that he (defendant) had been disturbed in his possession; suits had been commenced against him, from which he was in danger of eviction; that for want of title in the seller, the said sale is null and void, and should be rescinded.

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vs.
BARRETT.

Upon these pleadings and evidence the district judge sustained the exception, and dismissed the present suit. The plaintiffs appealed.

Preston, for the plaintiffs.

Peirce, contra.

Martin, J., delivered the opinion of the court.

In this case the plaintiffs claim the amount of two years' interest, on the price of a plantation and slaves, which their ancestor, in his lifetime, sold to the defendant's vendor, on a credit of twenty years, with interest thereon, payable annually.

The defendant resisted the demand, and prayed for, and obtained a dismissal of the plaintiffs' action, on the allegation and proof that the ancestor of the plaintiffs had, before his death, instituted suit against him for the first year's interest due on said sale, in the District Court of the United States for the Eastern District of Louisiana, in which he had made a good and valid defence: "that this suit was yet pending and undecided, and he could not, in the meantime, be prosecuted for arrears of interest, afterwards becoming due, or accruing on said price or purchase, until a decision is had in the first case."

The defence was pleaded by way of exception to the present action; and the District Court sustained the exception, and dismissed the suit. The plaintiffs have appealed to this court.

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HEIRS
vs.
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We are called upon to notice the fact, that our learned brother (Watts) in the District Court, has overruled a constitutional injunction, and we are quite in the dark as to the grounds of his judgment.

The counsel for the defendant stated in this court, that the interests of his client did not require any observation from him.

The pendency of a suit in the United States District Court, to enforce a demand founded on a contract of sale, the validity of which is attacked, and its rescission sought, cannot be pleaded as an exception to another suit in the state court, between the same parties, for a similar demand, founded on the same contract of sale.

The plaintiffs have an indubitable right of action for the other instalments, or years' interest now due, and which are the object of the present suit. This right of action cannot be exercised in the United States District Court, in which the ancestor of the plaintiffs instituted suit for the first instalments, or years' interest, when they became due, because of the change of residence of the parties. It is true, the present defendant put at issue, in the United States District Court, in the first suit, the right of the vendor, or ancestor, represented by the present plaintiffs, to recover on the consideration of the sale. This sale was alleged to be null and void, and asked to be rescinded. The allegation there made, was that the vendor, or ancestor of the present plaintiffs, was without title to the thing sold.

The suit in the United States District Court, is still pending, undecided and not even yet tried. Until the defendant shall have pleaded in the present suit, it cannot be assumed, although it is not improbable, that the same issue will be presented, as in that case. But even admitting what it is premature to decide, that the circumstance of this case, presenting an issue between the same parties, and pending at the same time in another court, would suspend the action of the state court, the plaintiffs have a right, nevertheless, to institute this suit and proceed therein, until the issue was made up; nay afterwards, to prepare the case for trial, and as soon as a decision in the former court would allow them, to proceed to trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and

reversed, the cause re-instated, the defendant's exceptions overruled, and the case remanded for further proceedings, the defendant and appellee paying the costs of the appeal.

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April, 1836.

GUERRIER
vs.
LAMBETH.

GUERRIER vs. LAMBETH.

9	839
109	234

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where a party is sued for loss and injury done to goods by his slave, the measure of damages should be the difference between the value of the goods before, and that after the injury done to them. He cannot be made liable for the profit the plaintiff (who was a tailor) might have made on them by his industry, in making them into clothes.

The master is liable for the acts and injuries done by his slave, acting either by or without his authority or order. He is answerable for all the damages occasioned by the offence or *quasi* offence, committed by his slave, except those done without his order, in which case he may exonerate himself by surrendering the slave to be sold.

This is an action for damages. The plaintiff alleges he leased a store from the defendant, and enjoyed for a while the uninterrupted privilege of opening his door and windows into the back yard of the premises, which was necessary to the enjoyment of the benefits of his lease; but that the defendant, with a view of vexing and harrassing him, illegally ordered one of his slaves to nail up the door and windows, who, in executing this order in the absence of the petitioner, upset a bottle of ink, which broke and fell upon a quantity of cloth, ready made clothing, wearing apparel, &c., and caused him injury and damage to the amount of six hundred and forty-one dollars and fifty cents, according to an account annexed, for which he prays judgment, with costs, &c.

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April, 1836.

GUBERIER
vs.
LAMBETH.

The defendant pleaded a general denial, and further averred that the plaintiff had no right whatever to the use of the back yard, and that in insisting on entering it by violence and threats, as he frequently did, he trespassed upon the quiet and peace of his lessor.

Upon these issues the cause was submitted to a jury, together with the evidence adduced by the parties. The jury returned a verdict "of three hundred and sixty-five dollars and fifty cents, for the plaintiff, together with the damaged goods." From judgment rendered thereon the defendant appealed.

There were two bills of exception taken to the charge of the parish judge, which he gave to the jury, and his declining to charge as requested, which are fully set forth in the opinion of the court.

Roselius and Preaux, for the plaintiff.

1. The verdict of the jury was rendered agreeably to the law and evidence of the case, and should be sustained.

2. The opinion of the parish judge was correct, and according to law, in refusing to charge the jury as prayed for by defendant's counsel.

3. That the plaintiff was the owner of the goods alleged to have been damaged, and it was but justice to allow him the value of them, and damages for his disappointment.

Conrad, for the defendant.

The defendant prays, that the judgment rendered against him be reversed, on the following grounds :

1. That the plaintiff, not being the owner of the goods alleged to have been damaged, and not having paid for the same, has no right to sue for damages that may have been sustained thereby.

2. That the damages are excessive.

3. That the judge erred in refusing to charge the jury as prayed by defendant's counsel, and in the charge which he gave them.

Bullard, J., delivered the opinion of the court.

This action was instituted, to recover from the defendant the damages he alleges he has sustained, in consequence of the defendant's slave knocking down a bottle of ink, which was suspended in his shop, and which fell upon a trunk of goods, and stained them. The jury found a verdict in favor of the plaintiff, upon which the court having rendered a judgment, the defendant appealed.

His counsel has called our attention to two bills of exception in the record, upon which he relies for a reversal of the judgment.

By the first it appears, that the defendant prayed the court to instruct the jury, that if the defendant was responsible at all, it was only for the difference between the value of the goods, before they had sustained the damage complained of, and their value afterwards, and further, that the defendant was not liable for any deterioration of the goods, after the act complained of, nor did the goods become by said act the property of the defendant; but the court refused to give that charge, and told the jury that the amount of damages, if any, which the plaintiff would be entitled to recover, would be the loss of profits which he might have made from the goods, as well as the value of the goods themselves.

We are of opinion, the judge erred in refusing to charge the jury as requested, and that in instructing them as he did, he laid down the law too broadly. It appears to us, that the standard of damages contended for by the defendant's counsel, is the correct one, and that the damaged property did not, by the act, become the property of the defendant, and at his risk. If the court meant by the profits which the plaintiff might have made, the advance for which he might have sold them, if the accident had not happened, then it cannot be distinguished from their value according to the proposition of the plaintiff. But the plaintiff is a tailor, and if the judge intended to convey the idea, that he was entitled to recover the additional value, which his labor and skill might have given to the goods, we think his charge was calculated to mislead the jury, and to make the defendant responsible for

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Where a party is sued for loss and injury done to goods by his slave, the measure of damages should be the difference between the value of goods before, and that after the injury done to them. He cannot be made liable for the profit the plaintiff (who is a tailor) might have made on them by his industry, in making them into clothes.

EASTERN DIST. a loss of profits, which he might have made by his own
April, 1836. industry.

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The master is liable for the acts and injuries done by his slave, acting either by or without his authority or order. He is answerable for all the damages occasioned by an offence or *quasi* offence, committed by his slave, except those done without his order, in which case he may exonerate himself by surrendering the slave to be sold.

The second bill of exceptions was taken to the refusal of the judge to instruct the jury, at the request of the defendant's counsel, that the plaintiff could not recover, unless it was proved that the act from which the injury resulted, was done by the order and authority of the defendant, or with his knowledge and approbation, and that even his subsequent knowledge and approbation of such act, would not make him responsible; but the court charged, that the master was responsible, if the damage had been caused by his slave, acting either by or without the master's order. We are of opinion the court did not err. The Civil Code declares, that "the master shall be answerable for all the damages occasioned by an offence or *quasi* offence, committed by his slave, independent of the punishment inflicted on the slave." *Article* 180. Except in the case in which the offence was committed by the order of the master, he may exonerate himself by surrendering the offending slave to be sold.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be reversed, and the verdict set aside; and it is further ordered, that the case be remanded for a new trial, with instructions to the judge, to abstain from charging the jury, that the plaintiff is entitled to recover, if any thing, the loss of profits which he might have made from the goods, as well as of the value of the goods themselves, and not to decline to charge them according to the request of the defendant, as set forth in the first bill of exceptions, and that the plaintiff and appellee pay the costs of appeal.

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CHASE
vs.
MAYOR ET AL.

CHASE vs. MAYOR ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The case of the corporation receiving runaway and offending slaves in the city jail, and working them in the chain gang on the streets, is in the nature of a bailment, in which the bailor is alone benefited; and the corporation is only bound to use the ordinary vigilance and diligence in keeping them.

Where the corporation of New-Orleans received a runaway slave and put him to work in the chain gang, on the public streets, and he made his escape from the guards, and it was in proof that the owner's agent was notified of it the next day, and no neglect or want of the ordinary vigilance appearing: *Held*, that the corporation was not liable for the value of the slave.

This is an action against the mayor and aldermen of the city of New-Orleans, to render the corporation liable and recover from it six hundred dollars, being the alleged value of a runaway slave, which the plaintiff's agent had sent to the city jail for safe keeping, and who escaped from the city guards while working on the streets.

The attorney for the corporation pleaded a general denial; and further averred that a certain slave named Peter, escaped from the police jail on or about the 9th day of August, 1833, without any fault of the keeper; the said slave being employed on the public works; and that the corporation is not responsible therefor.

The facts of the case are set forth in the following opinion of the district judge, who tried the cause in the first instance.

"It appears that Callender & Deblois sold the slave to W. H. Chase, for six hundred dollars, on the 8th of April, 1833. After this sale, the slave was allowed to remain at the store of Callender & Deblois, but having run away and engaged himself on board of a steam-boat, as a cook, Deblois sent him

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vs.
MAYOR ET AL.

on the 17th July, 1833, with an order to the jail, directing the jailor to receive the boy Peter, belonging to Captain W. H. Chase; no particular instructions were given in relation to the boy.

“On the 29th July, 1833, the boy was put out to work with the chain gang along with fifty-seven other slaves. He had on a ball and chain and they were attended by six keepers; the slave was put out to work in this way till the 8th August, 1833, on which day he made his escape, but in what manner and under what particular circumstances, does not appear.

“There is an obvious necessity in our city for a place of depot for runaway slaves, and for a place of confinement and punishment of those who offend their masters. The corporation ordinance of 1817, contained in the Digest of 1832, page 127, provides for such a depot, and for the principal regulations in relation to it. When the plaintiff or his agent availed himself of the ordinance to send his slave there, he is presumed to know the regulations relative thereto. I take it for granted, therefore, that the slave was properly sent out to work in the chain gang.

“The only question is, whether the corporation is bound to show an escape under such circumstances as to exonerate them from responsibility; they plead an escape without fault on their part, and to sustain it, show that the slave was ironed and the gang of fifty-eight slaves was attended with six guards. Were the defendants bound to show special circumstances of escape or loss of the negro, such as would exonerate them, as suppose the negro from hatred of life had jumped into the river and drowned himself, or an escape under such circumstances as no reasonable diligence or vigilance could have prevented?

“The question is not without its difficulties, but it appears to me they are bound to show such special circumstances to exonerate themselves. It does not appear that any notice of the escape was given to the plaintiff or his agent, or any attempt made to recover him. It is not a case for damages beyond the value of the slave, which I considered as best proved by the sale price in April, 1833.

“It is, therefore, considered that the plaintiff, William H. Chase, recover from the defendants, the Mayor, Aldermen and inhabitants of the city of New-Orleans, the sum of six hundred dollars, with costs of suit.” The defendants appealed.

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Peirce for the plaintiff contended, that there was no error in the judgment appealed from ; and in fact no cause or grounds for the appeal, which should be dismissed.

2. The answer alleges the escape of the slave without the fault of the keepers. The circumstances are to be shown by the corporation.

3. The corporation have not given in evidence any thing exculpatory ; if the six guards were enough for fifty-eight slaves, the boy could not have escaped without some negligence or the existence of some peculiar circumstances or events ; if they were not enough the city is liable for the consequence.

Eustis for the defendants.

1. The slave of the plaintiff was committed to the police jail, to be dealt with under the ordinances of the city.

2. The jailor had a right to employ him on the works of the city. See *City Laws, Digest of 1831, page 127, articles 5 and 6*. He could only be received on condition of being so employed. *Article 6*.

3. All the corporation is bound to do in relation to slaves thus committed, is to have them properly registered, clothed and fed, and provided with proper guards. The corporation is not bound for the *secret* escape of a slave, presumed by his commitment to be a runaway. *Article 5*.

4. No neglect is proved on the part of the servants of the defendants in relation to the escape of the slave.

5. The burden of proof as to the neglect in this case rests with the plaintiff. The difference between this case and an ordinary bailment is obvious. The person of the slave, his commitment as a punishment, and the duty of the jailor to send him out to work, qualify the obligations of the defen-

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dants, and change materially the presumptions of law in ordinary cases of bailment.

6. Promulgation is not necessary to give effect to the ordinances of the city. The laws of a corporation are presumed to be known to the corporators. In this case the *printed ordinances* are a sufficient promulgation. The slave of the plaintiff was committed under them. See *City Charter*, section 6. 2 *Moreau's Digest*.

Martin J., delivered the opinion of the court.

This is an action in which the plaintiff claims the value of a slave who made his escape while employed with the chain-gang on the streets, under the direction and control of the corporate authorities of the city of New-Orleans. Judgment was rendered against the corporation for the value of the slave, and the defendants have appealed to this court.

The slave in question was a runaway, and sent to the calaboso or city jail as such, without any particular directions regarding his treatment, his character, or the length of time he was to stay.

Three days afterwards this slave was, according to the provisions of one of the city ordinances, sent out in chains to work on the public streets, together with fifty-seven others, similarly situated, attended by six of the city guards as keepers, whose vigilance he eluded, and when the gang was returned in the evening he was missing, having effected his escape.

The district judge who tried the cause was of opinion the slave was properly put out to work, according to the city ordinance of 1817, (*Digest of City Laws*, page 127,) with the chain-gang, and was properly secured by a chain and ball. But the judge further decided that the defendants ought to pay his value, because they failed to prove the special circumstances of the escape, and because they took no steps to recover or reclaim the slave, and gave no notice to the plaintiff of his having made his escape.

The judge in the first instance admits the obvious necessity of providing a place in the city for the confinement and

punishment of runaway and offending slaves. It appears also that the provision made by the city ordinances for these objects has had more in view the convenience of the owners of slaves than the increase of the revenues of the city. And the counsel for the corporation has very properly observed in argument, that if the courts consider the city liable for the value of the slaves sent to the city jail for safe keeping, and who elude the vigilance of the guards, it must cease to receive any more slaves on such conditions.

This is similar to a case of bailment in which the bailor is alone benefited, as the city authorities receive but a bare compensation for the expenses attending the keeping of slaves thus deposited with them.

The facts of the case show that the slave was missing in the evening of the 8th of August, 1833, and on the next day the plaintiff's agent was duly notified of his escape.

From all the facts and circumstances adduced in proof in this case, and attending its history, no evidence was required of the defendants to show the particular manner in which this slave eluded the vigilance of the city guards and effected his escape. It is sufficient that the plaintiff's agent had timely notice; the plaintiff himself, at the time, was residing at Pensacola. If any steps tending to the discovery and reclamation of the slave could be made available, it was the duty of the agent to have taken them in time.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that judgment be entered for the defendants, with costs in both courts.

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The case of the corporation receiving runaway and offending slaves in the city jail, and working them in the chain-gang on the streets, is in the nature of a bailment, in which the bailor is alone benefited; and the corporation is only bound to use ordinary vigilance and diligence in keeping them.

Where the corporation of New-Orleans received a runaway slave, and put him to work in a chain-gang, on the public streets, and he made his escape from the guards, and it was in proof that the owner's agent was notified of it the next day, and no neglect or want of the ordinary vigilance appearing: *Held*, that the corporation was not liable for the value of the slave.

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HOLMES
vs
HOLMES.

HOLMES vs. HOLMES.

9L 348
52 1427
9 348
116 498
1116 548

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

An action for the breach of a contract of passage made by the wife with the captain of a ship, will be considered as personal under the article 107 of the Code of Practice, in which the husband has the right to prosecute and recover damages in his own name.

This is an action for damages. The plaintiff alleges his wife Eliza Holmes contracted with G. W. Holmes, commander of the ship *Princess*, on the 15th November, 1832, for her passage from Liverpool to New-Orleans, on certain terms and conditions. The husband who sues, alleges further, that the defendant violated the terms of his contract with his wife, for which he claims one thousand dollars in damages. This case was before the Supreme Court in 1834. See 6 *Louisiana Reports*, 463.

On the return of the case to the Parish Court, it was again submitted to a jury on additional testimony as stated in the opinion of the court thereon. The jury returned a verdict of five hundred dollars in favor of the plaintiff, from which the defendant appealed.

Preston for the plaintiff, denied that there was any error in the verdict or judgment appealed from. It related principally to questions of fact, which were fully made out by the evidence.

2. The exception to the mode of issuing the commission, and taking the evidence under article 430 of the Code of Practice, applies only to witnesses who are about to depart, and not to this case. This was a non-resident witness about to leave the state, for which the Code of Practice does not require an affidavit.

3. The affidavit is only required for the judge, and not the party. Notice is all he can require. If the witness resides out of the state, it is presumed, or *prime facie*, that he will leave before trial.

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4. Besides, in this case, the evidence was taken a second time on affidavit, motion and commission. It was taken both ways and in the legal form.

5. It was read from the commission executed by parole, and could have no other effect on the jury than if read from the commission.

6. The testimony of Holbrook which was not objected to, and regularly taken; and, indeed, all the witnesses fully sustain the verdict. The appeal is evidently frivolous and should be dismissed with ten per centum damages.

T. Slidell for the defendant.

1. This action should not have been sustained. The husband alone cannot bring it, and the exception to his right to sue was improperly overruled. *Code of Practice, article 107.*

2. The testimony of Hall and Holbrook, taken under commission was improperly admitted to be read. It was illegally taken. 1st. Because no affidavit was filed previous to the issuing of the commission. *Code of Practice, article 430.* 2d. That there was no order of court for the issuing of the commission. 3d. That the notice was for an unseasonable time, being for half past eight in the morning, and before ordinary business hours. 4th. That the judge does not state in his certificate that the witnesses were examined at the hour fixed, at which time only the party, even if properly notified, was bound to attend. 5th. If the article of Code of Practice cited, does not refer to such a case as the present, then the court had no authority at all to issue commission. The verdict is contrary to evidence.

3. The conduct of the captain was justified by plaintiff's conduct, which was improper and subversive of the discipline of the ship.

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Bullard J., delivered the opinion of the court.

This case was before us at the May term, 1834. (See 6 Louisiana Reports, 463.) It was then remanded for a new trial. On a subsequent trial the jury found a verdict for five hundred dollars, in favor of the plaintiff, and the defendant has appealed.

His counsel relies, for a reversal of the judgment, on a bill of exceptions in the record, on an exception to the right of the husband to institute this action in his own name, which was overruled by the court, and on the ground that the verdict is contrary to law and evidence.

The bill of exceptions was taken to the admission, by the court, of the depositions of Holbrook and Hall, which were objected to, on the ground that the commission issued irregularly; that reasonable notice was not given of the time and place of taking the depositions, and finally, that it does not appear that the depositions were taken at the time and place specified in the notice.

We do not think it necessary for a just decision of this case to examine the questions raised by this bill of exceptions, because it appears by the statement of facts, that the testimony of one of the witnesses, Holbrook, taken on commission before a different commissioner, was read in evidence without objection, and the deposition is in the record. It was, therefore, quite immaterial whether the other commission was correctly executed or not, as relates to the testimony of Holbrook; and as the witness Hall testifies to the same facts, and no attempt has been made to impeach the credibility of Holbrook, we cannot suppose that the rejection of Hall's deposition would have varied the result of the trial.

In support of the exception to the competency of the plaintiff to maintain the action in his own name the defendant relies on article 107 of the Code of Practice.

That article declares that husbands have under their control the personal and possessory actions to which their wives are entitled; therefore they can proceed judicially and in their own name, for whatever relates to the preservation of

An action for the breach of a contract of passage, made by the wife with the captain of a ship, will be considered as personal, under the article 107 of the Code of Practice, in which the husband has the right to prosecute and recover damages in his own name.

the dotal property, as well as to the recovering of the debts due them, these being under their administration; but the real actions of the wife must be brought by her. This article establishes a clear distinction between the personal and real actions of the wife. This must be considered either as the personal action of the wife, or as resulting from the violation of a contract made during the existence of the marriage, with the consent of the husband, and consequently regarding the community, and in either case the husband has, in our opinion, a right to prosecute it in his own name, and the exception was properly overruled.

On the merits, the matter was submitted to a jury, and in our opinion the evidence in the record fully justifies the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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BOND'S ADM'R.

MACARTY vs. BOND'S ADMINISTRATOR.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ASCENSION.

A mortgage which is not recorded in the parish where the property is situated, until after the death of the mortgagor, cannot have effect against his other creditors who are such at his death.

An administrator is without capacity to purchase property at the sale of a succession administered by himself; and it is equally clear he cannot do so by means of an agent or person interposed for that purpose.

An opposing creditor may attack a sale of property of an estate, as being illegally made to the administrator, without alleging fraud and injury to himself, when the evidence shows that in fact no contract of sale exists for want of parties capable of contracting.

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The general rule is that written titles form full and conclusive proof between the parties. But where a third person alleges nullity of a sale for some cause, parole evidence is admissible under such allegation.

It is no objection to the competency of a witness that he may be exposed in the course of his examination, to have questions propounded to him, the answers to which might subject him to a criminal prosecution. It is his privilege to decline answering them.

This case comes up on an opposition to the tableau of distribution, made out and filed by Narcisse Landry, administrator of the estate of Francis A. Bond, deceased.

L. B. Macarty the opposing creditor, made opposition to the sale of a tract of land and slaves, which was adjudicated to H. Treille at the second sale, for one thousand eight hundred dollars, and put down on the tableau as having been sold for that sum. The opponent alleges, it was adjudicated nominally to Trielle, but in fact for the benefit of the administrator, which renders the sale illegal, the latter having no authority to purchase at the sale of an estate administered by him, either directly or indirectly. He prays that the sale be declared null, and the property decreed still to belong to the succession of Bond, and that the administrator pay one thousand dollars in damages. Treille was called and examined as a witness by the administrator, and his testimony excepted to. He had a conversation with the administrator before the sale, who told him the land and this slave had been offered several times, and no sale effected; that he could not purchase himself, although one of the largest creditors; he told witness to purchase it, and he did so with the intention of selling to the administrator. He never gave his notes, &c.

The opponent further alleges that he is a mortgaged and privileged creditor of the estate administered by Landry, for the sum of five thousand five hundred dollars, due the 9th of April, 1834; secured by a mortgage on the estate of the deceased, in the parish of Ascension, and a pledge of sixty shares of Union Bank stock attached thereto, by public act passed before Octave De Armas, in the city of New-Orleans, the 6th of April, 1833. This mortgage was not recorded in

the parish of Ascension until after the death of the mortgagor. The judge of probates decided that the first ground of opposition could not be sustained, because the mortgage of the opponent was not recorded until four months after the succession of Bond, the mortgagor, was opened. *Louisiana Code, article 3327.* EASTERN DIST.
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That the second branch of the opposition could not be sustained, because H. Treille, the vendee or person to whom the land and slaves was adjudicated, was not before the court a sa party. *M'Combs vs. Dunbar et al. 3 Louisiana Reports, 517.* Macarty, the opponent, appealed.

Morphy, for the appellant.

A. and J. Seghers, for the administrator and appellee.

1. The opposing creditor and appellant cannot attack the legality of the sales made in this case, under pretence of said sales being made to the administrator of the estate, when on the face of the papers they appear to have been made to H. Treille, unless he first shows that said sales were made in fraud of his rights as creditor, and that he has suffered damages as a consequence of said alleged illegality. *Louisiana Code, articles 1964, 1965 and 1973.*

2. He has no right of ownership to the property sold, only a general *jus in re*, the kind of pledge on that property as well as on all the other property of the estate of F. A. Bond; which he has in common with all the other creditors of the estate, according to the *Louisiana Code, article 3150.*

3. No damages have been proved to have resulted from the sales attacked as illegal. The property could not at the time of sale have brought a higher price, than the price for which the same was sold, and which is carried to the credit of the estate.

4. The sales made to H. Treille, cannot be declared null and set aside in this case, the vendee not being a party to the suit. The opposition necessarily resolves itself into a claim for damages, and none are proved. *3 Louisiana Reports, 517, 521, 522.*

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5. The mortgage in favor of L. B. Macarty, not having been recorded until after the succession of F. A. Bond was opened, has no effect against the other creditors of the estate, said estate having been accepted under the benefit of inventory, and being insolvent. *Louisiana Code, article 3327.*

Bullard, J., delivered the opinion of the court.

In this case the appellee, acting as administrator of the succession of F. A. Bond, deceased, filed a tableau of distribution, to which Macarty, a creditor, made opposition on two grounds: 1st. That the claim of the opponent against the estate, was set down as a simple, and not as an hypothecary debt; and 2d. That Landry, the administrator, was himself the purchaser of the land; and the slave Charlotte and her child, nominally adjudicated to Hubert Treille. That the sale of said land and slaves is null, and they still form a part of the estate of Bond, and are subject to be administered as such.

A mortgage which is not recorded in the parish where the property is situated, until after the death of the mortgagor, cannot have effect against his other creditors, who are such at his death.

With respect to the first ground of opposition, we are of opinion the court below did not err in overruling it. Macarty's mortgage was not recorded in the parish where the property is situated, until after the death of Bond, and according to article 3327 of the Louisiana Code, it can have no effect as a mortgage against the other creditors of the deceased.

An administrator is without capacity to purchase property at the sale of a succession administered by himself, and it is equally clear he cannot do so by means of an agent, or person interposed for that purpose.

In relation to the pretended sale of the plantation and slaves, the price of which forms the first item in the tableau, the evidence in the record shows, that H. Treille, to whom the property was adjudicated at the public sale, was acting for Landry, the administrator; that he was nothing more than a person interposed, for the purpose of divesting the estate of the title for the benefit of Landry. It is admitted, that the administrator is without capacity to purchase at the sale of the estate, administered by himself; and if he cannot validly purchase for himself, it appears to us equally clear, that he cannot do so by means of an agent or person interposed for that purpose. With this evidence before us, we are bound to say, that in our opinion, the estate of Bond has

not been legally divested of title. The evidence of this fact comes from the nominal purchaser himself, who does not pretend to have acquired any title; who disclaims on oath, any pretension to the property, and against whom it would, therefore, be nugatory to misstate any proceedings.

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But it is contended, that the opposing creditor cannot attack the legality of the sales, in this case, under pretext that the same were made to the administrator, when on the face of the papers they appear to have been made to H. Treille, unless he first shows said sales were made in fraud of his rights as creditor, and that he suffered damages in consequence of such alleged illegality; and he relies on articles 1964, 1965 and 1973, of the Civil Code. We cannot assent to this proposition. The question here, is not whether a sale ought to be avoided as fraudulent, but whether a contract of sale is shown to exist. Without parties capable of contracting, there can be no contract; without a vendee capable of purchasing, there is no sale. We are of opinion there has been no sale of the property, because the administrator is incapable of purchasing, either directly or by interposition of a third person.

An opposing creditor may attack a sale of property of an estate, as being illegally made to the administrator, without alleging fraud and injury to himself, when the evidence shows that in fact no contract of sale exists, for want of parties capable of contracting.

If the question before the court were, whether a party in possession, under the purchase, could be condemned to surrender the property without being made a party to the suit, there would be much force in the further argument of the appellee, in support of which he relies on the case of *Dunbar vs. M'Combs*. 3 *Louisiana Reports*, 517. But that case was very different from this. In that case, suit was brought to annul certain proceedings and alienations alleged to have been conducted under a void authority, and the purchasers of the property were not made parties. In the present case, if there was any purchaser, it was the administrator of the estate, and Treille, who was the nominal vendee, is produced as a witness, and disclaims. But the testimony of Treille was objected to, on the ground that parole evidence cannot be introduced to contradict a written act of transfer of immoveable property; and also, that the witness was incompetent to testify, as he might criminate himself. A bill of

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The general rule is, that written titles form full and conclusive proof between the parties; but where a third person alleges nullity of a sale for some cause, parole evidence is admissible under such allegation.

It is no objection to the competency of a witness, that he may be exposed in the course of his examination, to have questions propounded to him, the answers to which might subject him to a criminal prosecution. It is his privilege to decline answering them.

exceptions was taken, upon which the appellee relies in this court. We think the court did not err, in admitting the evidence. The general rule is, that written titles form full and conclusive proof, between the parties; but in this case, a third person alleges nullity, and we think parole evidence admissible, under such an allegation. The witness when sworn, was certainly not bound to answer any question which might subject him to a criminal prosecution, but it is no objection to the competency of a witness, that he may be exposed in the course of his examination, to have questions propounded to him, the answer to which might criminate him. It is his privilege when such questions are propounded, to decline answering, and to claim the protection of the court.

With this view of the case, we are of opinion that the opposition ought to have been sustained, as to the first item of the tableau; and the land still considered as belonging to the estate, and subject to be administered, according to law, for the benefit of the creditors.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be reversed, that the opposition to the first item in the tableau, on the ground that the land and slaves are still the property of the estate, be sustained, and that the case be remanded for further proceedings according to law, the appellee paying the costs of this appeal.

MONTREUIL ET AL., f. p. c. vs. PIERRE, f. m. c.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

If no original whatever of a notarial act can be found in the office of the notary, a copy certified by him, with his seal appended, would still be admissible in evidence, and have effect, because it must be presumed

from the official character of the notary, to be a copy of an original, which once existed.

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The loss or destruction of the original act will rather be presumed or supposed, than that the notary was guilty of forgery, in giving a certified copy of an act that never existed.

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Where a person of color alleges he is free, and has been so for many years, he will be allowed to avail himself of any legal evidence in his favor, under this plea, without being bound by the pleadings to specific proofs.

This suit was instituted by Bazile Montreuil *alias* Bazile Dédé and Charlotte his wife, and Jeanne Dédé, f. p. c., to recover the estate of one François Montreuil *alias* Louis Dédé. They allege that they are the only legitimate brother and sister of the deceased Louis Dédé, but that one Charles Pierre, a negro, claims the estate, in virtue of a nuncupative will, purporting to have been made the 13th of April, 1834, in which he, the said Pierre, is instituted sole and universal heir and legatee, and testamentary executor of said will, which has been ordered to be executed accordingly by the Court of Probates. The plaintiffs further allege, that the said will is null and void, because being only attested by three witnesses, and one of them not residing in the parish, at the time of signing. 2. That Charles Pierre, the pretended legatee and testamentary executor, was born a slave, and has never been legally emancipated.

They pray that the will be annulled; the order for its execution rescinded; that they be declared the legal heirs, and Charles Pierre be directed to surrender the estate of the decedent into their hands.

The defendant pleaded the general issue, and also set up his claim under the will, and that he had accepted the succession of the deceased. He further averred, that he was free, and had been in the constant enjoyment of his freedom for the last twenty-four years, and more. He avers that the will is valid, and prays that he be dismissed with his costs.

In a supplemental petition the plaintiffs further alleged, that the bequest made in the will to Charles Pierre was

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The defendant died soon afterwards, and the suit was carried on against his surviving wife and widow, Desirée Carrière, a free woman of color. The latter likewise filed her petition in the Court of Probates, claiming the estate and inheritance of her late husband, Charles Pierre, and praying that an inventory be made thereof, and that she be put in possession.

Shortly after these proceedings commenced, one Rosette Devillier, a woman of color, presented her petition to the Court of Probates, alleging that she was originally a slave, belonging to Madame Jumonville Devillier, and had since obtained her freedom. But while a slave, on the 1st September, 1797, she had a son, who was baptised by the name of Charles, and called Charles Pierre, the same whose estate and inheritance is claimed by his widow, Desirée Carrière; that her son being born a slave, she afterwards, in the year 1807, purchased him from the executors of Madame Jumonville Devillier, for the sum of five hundred dollars, and that he remained her slave from that period to his death, by reason of which, his succession and property of every description belonged to her, which she prays may be so decreed, accordingly.

The widow and administrator admitted Charles Pierre was the son of the plaintiff, Rosette Devillier, but denied that he was ever her slave, and averred he was free, and had been in the constant and uninterrupted enjoyment of his freedom, for the last twenty-seven years before his death, &c.; that his surviving wife is his heir, and as such entitled to his estate.

Upon these issues the parties went to trial. The two cases were consolidated and tried together.

In support of the claim of freedom set up by Charles Pierre and his representative, a document was offered in evidence, purporting to be a copy of an authentic act, passed

in 1807, before Pierre Pedesclaux, notary public, in New- Orleans, in which it is stated, that Charles Pierre, called also Bernard, was purchased from the executors of Madame Jumonville Devillier, for the sum of five hundred dollars, paid by his mother, Rosette Devillier, and in the same act he is emancipated and set free. The evidence also showed, he had lived and enjoyed the rights of a free person of color, uninterruptedly, ever since.

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The counsel for the plaintiffs took a bill of exceptions to the introduction of this paper in evidence, "on the ground, that the said copy is not dated; that there is not, in the records of Pierre Pedesclaux, for the year 1807, any complete act from which the aforesaid copy could have been taken; but that there is the project of an act, dated August 13, 1807, entirely and literally similar to the above copy, but not signed by any body, and having on the contrary the word 'null' written at the foot of it, in the hand writing of the said Pierre Pedesclaux, which project the plaintiff contends, was the original of the aforesaid paper, offered by the defendant, and that, therefore, the last mentioned paper being an incorrect copy, and not the copy of a notarial act, ought to be rejected; and also on the ground, that notarial acts ought to be recorded in regular books, to affect third persons; that it appears that the book of acts passed by Pierre Pedesclaux, in 1807, was so regularly kept, that no pages are wanting in the same, and that there is no act in the said record, bearing any resemblance to the aforesaid copy, except the said project of August 13, 1807; but the court admitted said paper, on the ground that the copy offered by the defendant, bears the signature and the seal of the late Pierre Pedesclaux, formerly a notary of this place. The court further observes, that the grounds of opposition stated by the plaintiffs' counsel, inasmuch as they relate to facts as by him above stated had not been by him substantiated, by previous proofs of said facts, except with regard to the existence of a *project* of acts, containing verbatim the same as the copy now introduced and objected to, and which is to be found at page 506 *recto* of the minutes of the late Pierre Pedesclaux, for

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the year 1807, which project bears no signature of either parties, notary or witnesses."

The probate judge rendered judgment sustaining the will and Charles Pierre's inheritance under it; and also that he was free, and in favor of the claim of his widow to take his succession. From this judgment the plaintiffs in both suits appealed.

Louis Janin, for the plaintiffs.

These two cases depend upon nearly the same facts and the same questions of law, and have therefore been argued together, both in the Probate Court and in this court. The pleadings present only two questions, viz: 1st. Was Charles Pierre free at the date of the testament or not? In the former hypothesis the plaintiffs in both cases will be nonsuited; in the latter Charles Pierre could receive nothing under the testament, (article 1462,) which therefore would be void on account of the incapacity of the legatee, and the property claimed as his estate, was really the property of his owner, his natural mother. 2d. Even if he had been free when the testament was executed, it would not be valid, if, as is alleged by the plaintiffs in the first case, one of the witnesses to it was not a resident of the parish where it was made.

1. The evidence very clearly establishes, that Charles Pierre was born and baptised in 1797, and that Rosette Devillier, his mother, was then the slave of Madame Jumonville Devillier. Some time afterwards she was emancipated. In 1806 or 1807, Madame Jumonville Devillier died; in the latter year her three testamentary executors sold Charles Pierre to his mother. This is proved by two of the grand children of Madame Jumonville, viz: Madame Hutchet Kernion and Mr. Coulon Jumonville, whose evidence will be found on page 41 of the record. They well recollect the sale, which was made with the consent of the family. No act of sale is produced, but a receipt, dated, July 4th, 1807, and signed "Moulon," by which Moulon acknowledges to have received from Rosette Devillier, for Mr. Jumonville, one

of the executors, the sum of five hundred dollars. This receipt is explained by the witnesses.

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2. They saw her counting this money, and accompanied her when she carried it to Moulon, for the purpose of paying it for her son. One of them saw her counting it to Moulon, heard the conversation that then took place, and saw Moulon giving her a receipt for it. From that time, Charles Pierre staid with his mother. This sale took place and was perfected during the prevalence of the Spanish law, by which even a parole sale of immoveables is valid, if accompanied by possession. 6 *Martin, N. S.*, 257. 7 *Martin, N. S.*, 321. 8 *Martin, N. S.*, 197. 3 *Louisiana Reports*, 107.

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3. The defendants offered at the trial a paper in evidence, purporting to be a copy of a notarial act, of August 13, 1807, by which the testamentary executors of Madame Jumonville Devillier, emancipated Charles Pierre, in consideration of the sum of five hundred dollars, paid by his mother. This paper is signed by Pierre Pedesclaux, notary public ; it is in the hand writing of one of Pedesclaux's clerks, who has been dead many years, but it is without date, and not certified a true copy. *Page 18 and 19 in Rosette Devillier's case, and 54 in the other case.* It was admitted by the court, and the plaintiffs took a bill of exceptions. It can clearly have no effect, in the decision of this case, for the original of this pretended copy never had existence. In the records of the notarial acts of Pierre Pedesclaux, an act is found bearing the same date as the paper in question, and agreeing with it word for word, but having no signature whatever, and having written under it the word "null," in Pedesclaux's hand writing. The alleged copy, on the other hand, states that the original was signed by the three executors, two witnesses and the notary. This imperfect act, is no doubt the original of the but too perfect copy. The simple inspection of the original record, affords convincing proof, that it cannot be otherwise ; there is no leaf wanting in the whole book ; the manner in which the acts were written, on quires, would render such a defect immediately perceptible, and it is in evidence, that

EASTERN DIST. Pedesclaux never wrote his acts on detached sheets of paper.
 April, 1836. The pretended copy is therefore a nullity ; of itself it has no

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force or effect. See *Civil Code*, page 308, article 235. The Spanish law differs but little, but is rather more strict than ours. 1 *Tapia*, 228. 4 *Tapia*, 159, 162, 190. How this copy came to be made, when, by, and to whom it was delivered, the defendants have not explained. The plaintiffs offered to prove by Rosette Devillier, the circumstances attending the purchase of her son, but she was rejected upon the grounds stated in the bill of exceptions, on page 47, and which are believed to be wholly untenable.

4. It would be nugatory to follow the defendants in their attempt to prove that possibly another original of this copy may have existed. It was incumbent upon them clearly to prove its existence and loss, *Civil Code of 1808*, page 308, article 235 ; and in this they have completely failed.

5. There are many other objections to the introduction of this copy. It is in direct contradiction with the pleadings, it is not certified a true copy, and were it an original it would be null and void ; for by the Spanish law, an act of emancipation, had to be attested by five witnesses. *Bazzi vs. Rose*, 8 *Martin's Reports*, 149.

J. Seghers, for the defendant.

1. According to the provisions of the Spanish laws, a mother could not buy her son, and afterwards keep him as her slave ; and she has no claim on his succession for the price she gave for him. *Partida 2*, title 29, law 12. *Febrero Adicionado*, (edition of 1807,) part. 2, lib. 2, cap. 2, sec. 1, No. 31.

2. Pursuant to the same laws, a slave acquires his freedom, *ipso facto*, when his master holds him out as free, and allows him to marry a free person, in his presence, and with his consent. *Partida 4*, title 5, law 1. *Ibid.*, title 22, law 5.

3. Ten years' possession of freedom, in the presence of the master, were necessary under the laws of Spain, to entitle the slave to freedom by prescription. 5 *Martin's Reports*, 566.

4. The above laws were repealed by the sweeping act of 1828; but it has been contended in the court below, that they had been repealed long before, viz: in 1807, by the general law, enacted "to regulate the conditions and forms of the emancipation of slaves." This position is not correct. On the contrary, we find that particular laws are not repealed by a subsequent general law, containing different provisions. To produce that effect, the provisions of those laws must be incompatible. 10 *Martin's Reports*, 172, *De Armas's case*. 3 *Martin, N. S.*, 190.

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5. The case of *Meilleur vs. Couprey*, 8 *Martin, N. S.*, 128, has been relied upon by the plaintiff; but even admitting this case to be law, *which is doubted*, it matters not; for the law regulating the emancipation of slaves, though approved on the 9th of March, 1807, did not go into operation before the 1st of September of the same year, (see section 8,) when Charles Pierre had already been emancipated, and the price of his freedom paid for by his mother.

6. The character of the notary standing unimpeached, his office being proved to have been kept in very bad order, and the copy produced on the trial being very old, the presumption is, that the original has been lost, and that the copy was handed to Charles Pierre by his own mother. *Civil Code*, page 309, articles 234, 235. *Louisiana Code*, articles 2247, 2248. 5 *Martin's Reports*, 405. 7 *Martin, N. S.*, 548, *Tate vs. Penn.*

7. The allegations in the answer are sufficient; and besides, the above copy was introduced in evidence, without being objected to on that score. 6 *Martin, N. S.*, 86.

8. The surviving wife is called to the inheritance, and preferred to all the *natural relations* of the husband, except those of the descending line. 6 *Louisiana Reports*, *Victor vs. Tagiasco*.

9. According to the French and Spanish jurisprudence, the *copia* or *expedicion* needs not be certified as being true copies, nor is it necessary to put a date to it: "*y no dada por concuerda, como algunos practicon por ignorancia.*" "Por lo

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que solo dándolas en año diverso, deberá añadir en la suscripción la fecha del en que las da." *Febrero Adicionado*, part. 1, cap. 19, sec. 1, Nos. 11, and 13. *Nouveau Denisart*, vol 8, verbo *Expédition*, page 319. *Ibid.*, vol. 4, verbo *Collation de pièces*, page 592.

Magnin and *Fourchy*, for the plaintiff, *Rosette Devillier*, contended, that the judgment of the Probate Court should be reversed, as being contrary to law, and that judgment should be rendered for the plaintiff, on the following grounds:

1. *Charles Pierre* was born a slave, and cannot be considered free, *unless* duly emancipated, according to the provisions of law established and required in such cases.

2. He has never been emancipated legally, and therefore, died a slave.

3. The plaintiff in this case, being the true and legal owner of *Charles Pierre*, is entitled to his succession.

4. The prescription alleged by defendants, to establish the freedom of *Charles Pierre*, cannot avail them, because the time required for such prescription did not run during the lapse of time, or the number of years requisite for such prescription.

5. The defendants have not alleged in their defence, that they intended to establish his (*Charles Pierre*) freedom, otherwise than by prescription, and the alleged enjoyment by him, of the said alleged freedom.

6. The defendants, therefore, cannot be admitted to prove said freedom, otherwise than agreeably to their allegation, and are precluded from the right of resorting to written instruments.

7. The act purporting to be the emancipation of *Charles Pierre*, should it be valid in itself, cannot invalidate the prohibition of the law to have slaves emancipated, except under certain exigencies duly complied with.

8. Prescription, again, (if any there be, which is denied,) cannot avail them, because it is a maxim of *public rights* (*droit public*,) that *prescription cannot run against the sovereign* (*nulla prescriptio contra principem*.)

9. The *sovereign*, in a republican state like this, is the *law* which has provided that slaves can in no case be emancipated, without strict compliance with the legal requirements provided by law.

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10. The act purporting to be the emancipation of Charles Pierre, is a mere nullity; nothing else but a sheet of paper, and must therefore be completely disregarded; no *signature* at the foot of the *original*, and the word "*null*," in the hand writing of the notary, at the foot of the same.

11. The judgment of the court below, does not mention that the word "*null*" is of the proper hand writing of the notary, as established by the testimony. In this respect it is erroneous.

Louis Janin, on the same side, in conclusion.

1. The contestation between the parties in relation to the copy of the act of emancipation, produced by the defendants, on which their case depends, resolves itself into two questions, viz: 1st. Did the original of this pretended copy ever exist, or was the copy not rather delivered through error, when the original was indeed never executed? The defendants have completely failed in their attempts, to prove the existence and loss of the original; the contrary is very evident. 2d. Can this copy of itself make proof, or are the defendants not bound to produce the original, or prove its existence and loss, when the genuineness and correctness of the copy is impeached? The solution of this question can present no difficulty; notarial records would be of no use, if copies produced the same effect as the originals. A copy attested by a notary is presumed to be genuine, until it is impeached; but it can certainly be questioned, for otherwise parties would be the helpless victims of the frauds and mistakes which might be committed by notaries.

2. The Spanish law is not, and could not be different from ours, in relation to the credit to be given to copies. The Spanish law recognised three sorts of public instruments, viz: 1st. The *protocolo*, the origin and fountain of all the

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copies, (*copias ó traslados*) the use of which was introduced to ascertain and verify the correctness of the latter.

1 *Tapia*, 227 and 228. *Curia Phillippica*, folio 91, No. 31.

2d. *La copia* original, which was taken from the *protocolo*, and attested by the notary, before whom the original had been executed, who certified, that the act of which he delivered the copy *had been executed before him*. 1 *Tapia*, 229, (he cites *Partida* 3, title 18, lib. 54.) 3d. The "*traslado*," which was the copy taken from the *copia original*, 1 *Tapia*, 230.

3. The defendants have cited Febrero Adicionado, part. 1, cap. 19, sec. 1, Nos. 11 and 13. These paragraphs are the same as paragraphs 10 and 12, on pages 229 and 230 of the first volume of *Tapia*. The first of them says, that the "*copia original*," must not be certified "*por concuerda*," but attested according to law 54, title 18, part 3, that is, the notary must attest that the act was passed before him. The second states, that of certain acts the notary before whom they were executed, can give to the parties interested as many copies as they may require that all the copies taken by that notary from the *protocolo*, and having the proper form, are "*copias originales*," and that not only within the year in which the act was passed, but at any subsequent time, *that* notary could give copies certified like *copias originales*, and not "*por concuerda*." Some notaries were of opinion, that they could give *copias originales* only within the year, and that after that time they could only give copies certified "*por concuerda*." This error is refuted by Febrero, who adds, that if the copy is given in another year, the date on which it is delivered must be added. From this last expression, the defendants have hastily inferred, that if the copy is given within the year, it need have no date, which is nowhere said by Febrero, who, on the contrary, asserts, (1 *Tapia*, 231,) that the law requires the copies to be in the same form, at whatever time they are delivered. Febrero only meant to say, that it ought always to have its proper date. Applying the preceding explanations of Febrero to the copy in question, we find that it has not the attestation

of a *copia original*. If it is not a *copia original*, but an ordinary copy, (*trasunto* or *traslado*,) it ought to be certified, "*por concuerda*." This certificate is also wanting. But whether it be the one or the other, it ought to have a date. The defendants contend, that because it has no date, it must be presumed to be a "*copia original*," and to have been executed within the year of which the act bore date. But it has already been shown, that this pretension is inadmissible, and indeed it involves this absurdity, that because a copy is deficient in one of the usual, and certainly essential requisites of copies, a higher character and greater effect must be given to it, than if it contained this requisite. From this it follows, that nothing authorises us to suppose that it was executed while the Spanish law was in force. Its character must, therefore, be decided by the Civil Code, page 309, articles 234 and 235. According to those articles, copies to make proof, must be certified conformable to the record, and even if so certified, they are without effect if they are proved to be incorrect. The copy in question, is not certified as article 234 requires, and would, therefore, under no circumstances dispense with the production of the original; and the plaintiffs have, besides, proved that it is incorrect.

4. Leaving this point, it may be laid down as an unquestionable principle of the Spanish law, that no kind of copy can make proof, if it is not conformable to the original, and that its incorrectness may always be shown. 4 *Tapia*, 159, No. 79. *Ibid.* page 190, No. 17. 1 *Tapia*, 228, Nos. 9 and 229, page 10. *Curia Phillippica*, page 9, No. 31, and page 92, No. 33. The law on this subject is very clearly summed up, in *Teatro de la Legislacion*, volume 17, pages 9 and 10, *verbo. Instrumentos*.

5. The defendants contend, that by the Spanish law, a parent could not hold his child in slavery. The contrary is very distinctly asserted in *Valsain vs. Cloutier*, 3 Louisiana Reports, 176, and clearly appears from *lib. 1, title 10, part 4*. The defendants rely on *part 2, title 29, lib. 12*. That whole title does not contain one word on slavery, but speaks only of prisoners of war.

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Bullard, J., delivered the opinion of the court.

The first of these actions was instituted by the heirs at law of one François Montreuil, f. m. c., to cause to be declared null and void his testament, by which the original defendant, Charles Pierre, a man of color, was instituted his heir, and appointed executor, on the grounds: 1st. That one of the witnesses was not a resident in the parish, when the testament was made; and 2d. That the instituted heir was a slave, and consequently, under a legal incapacity to take by will. The defendant put in an answer, maintaining the validity of the testament on both grounds, and especially alleging that he was free, and had been in the undisputed enjoyment of his freedom for more than twenty years. Before this issue was tried, the defendant died without children; but having a widow, who therefore came forward to be admitted as his heir at law, and made herself a party to the original suit. She maintained the validity of the will, and the freedom of her deceased husband. There are other incidents to this proceeding, which it is not necessary to detail. About the same time, Rosette Devillier, f. w. c., the mother of the deceased Charles Pierre, came forward and presented her petition in the Probate Court, claiming the estate of her son, adversely to his widow, except so far as it depended on the will of Montreuil, on the ground that Charles Pierre was her slave, by purchase from his former mistress, or her executors.

After a trial in the Court of Probates, the validity of the will was sustained on both grounds, and the freedom of Charles Pierre recognised, and the original plaintiffs, together with Rosette Devillier, appealed.

The two cases have been twice argued in this court, and we have bestowed upon them our most serious attention. It must be confessed, they present a novel and repulsive spectacle. A mother, whose son is shown to have died in the undisputed condition of a free man, except so far as this suit is concerned; who had enjoyed *de facto* that condition in her presence, for a series of years; who had married a free woman with the assent of his mother, now comes forward, after his death, to claim the fruits of his industry, on the

allegation that her son lived and died her slave ; that he was a mere thing, incapable of acquiring property, or of taking or transmitting any thing by inheritance. Such pretensions must be rigorously scrutinized ; for while we are forced to admit, that the relation of mistress and slave may exist between the mother and her child, as a necessary result of her legal capacity to purchase, and his liability to be sold as a thing in commerce , yet when her title rests upon purchase, she must show that her intention was, not merely to ameliorate the condition of her child, by redeeming him from the authority of his master, but to hold him in the same condition, with a right to sell him again, and subject to the payment of her debts, or to be transmitted to her heirs.

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It is clear, that Charles Pierre was born the slave of Jumonville, and that at the age of twelve years, to wit: in 1807, and before the act of the legislature prohibiting the emancipation of slaves before the age of thirty years, had began to operate, he passed from the power of his former master, under the control of his mother. The nature of the contract, by which this change in his condition was effected, forms the principal difficulty in this case. On the part of Charles Pierre, it is contended, that for a sum of five hundred dollars, paid by the mother, he was emancipated by the executors of Madame Jumonville ; but the mother contends, that she purchased him as a slave, and paid for him as such, the sum of five hundred dollars.

To prove the emancipation of Charles Pierre, who was known also by the name of Bernard, the defendants offered in evidence, a document purporting to be a copy signed by P. Pedesclaux, under his notarial seal, of an act passed before Pedesclaux, on the 13th of August, 1807, by which the executors of Madame Jumonville declare, that they have in their possession, as her slave, a little negro named Bernard, aged about twelve years, free from incumbrances, and they declare that they give his liberty, to said Bernard, in consideration of the sum of five hundred dollars, paid to them by his mother, Rosette Devillier ; desisting from all claims and

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right of property, upon him, in favor of himself; that he might thenceforward enjoy all the prerogatives attached to free persons. This act appears by the copy to have been signed by the executors, and two witnesses. The introduction of this document was opposed, on the ground that the said copy is not dated, and that there is not in the records of Pierre Pedesclaux for the year 1807, any complete act from which said copy could have been taken, but that there is the *projet* of an act, dated August 13th, 1807, entirely and literally similar, but not signed by any body, and having on the contrary, the word "null," written at the foot of it, in the hand writing of the notary, which *projet*, it was contended, was the original of the aforesaid papers, which being an incorrect copy, and not the copy of a notarial act ought to be rejected; and, also, on the ground that notarial acts ought to be recorded in regular books, to affect third persons; that it appears that the book of acts passed by Pierre Pedesclaux in 1807, was so regularly kept that no pages are wanting in the same, and that there is no act in the said record bearing any resemblance to the aforesaid copy, except the said *projet*. The court admitted the paper, on the ground that it bears the signature and seal of the notary; and the judge adds, in the bill of exceptions, signed by him, that the grounds of objection stated by the plaintiffs' counsel, so far as they relate to facts, as by him stated above, had not been substantiated by previous proof of said facts, except with regard to the existence of a *projet* of an act as above spoken of, in the register of the notary, without the signature of either of the parties, notary or witnesses.

In considering this bill of exceptions, we are bound to inquire into the admissibility of the document in question, according to the proof of facts previously administered, to destroy the presumption of its being a genuine copy of an authentic act arising from the certificate of the notary. The only facts which appear to have been so proved, according to the certificate of the judge, were, that there existed in the register of Pedesclaux for the year 1807, a *projet* of an act, exactly similar, but without the signatures of parties, wit-

nesses or notary, and that the copy is without date. The want of date to the copy, we do not consider of any importance, and may be laid out of view.

The objection in substance is, that the instrument offered is false or forged; not merely that it is not a true copy, but that no such original or protocol ever existed; and we are asked to infer this from the negative fact, that no such protocol, signed by the parties and witnesses, is found in the office of the notary, after a lapse of nearly thirty years, and from the positive fact, that a mere *projet* is produced of similar date and context, but not completed by the signatures of the parties. If no original whatever could be found, in the office of the notary, it appears to us, that a copy, certified by the notary, would still be admissible in evidence; because it must be presumed, from the official character of the notary, to be a copy of an original which once existed. If the evidence stopped there, it would be insufficient to exclude the copy; for we are rather to suppose the loss or destruction of the protocol, than that the notary was guilty of a forgery.

How is the case varied, when coupled with the other fact, that there does exist on the register, an original *projet* of an act of the same tenor?

According to the Spanish law, in force when this transaction took place, the *instrumento* was divided into three kinds, or rather degrees: the *registro*, the *original* and the *traslado*. The *registro* or *protocol* was kept by the notary, as the form from which the *original* was transcribed; the *original* was in fact a copy from the *protocol*, certified by the notary, and the *traslado* a copy not of the *protocol*, but of the *copia original*. The document in question purports to be the *copia original*. The authorities cited by the plaintiffs' counsel from Febrero, do not, as we understand them, carry the doctrine so far as he contends for, and authorise the court to presume, that no such act was ever passed, upon such proofs as have been exhibited in this case. Great faith was attached to the official acts of notaries, and Gregorio Lopez, in his commentaries on the 9th law, 19th title, of the 3d Partida, says that when the instrument is ancient, and the notary dead, it

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If no original whatever of a notarial act can be found in the office of the notary, a copy certified by him, with his seal appended, would still be admissible in evidence, and have effect, because it must be presumed from the official character of the notary, to be a copy of an original, which once existed.

The loss or destruction of the original act will rather be presumed or supposed, than that the notary was guilty of forgery, in giving a certified copy of an act that never existed.

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will be presumed that a *protocol* once existed, though none can be produced: "*Si verò instrumentum scriptum esset antiquum et tabillio jam mortuus, videratur standum instrumento sumpto, licet de protocollo non appareat, cum presumi debeat processisse ex temporis diuturnitate.*"

The fact that the notary wrote the word "*null*" under the imperfect act, did not render the act more null than it was before; and it might be fairly argued, that the notary wrote it for some purpose, and perhaps for the purpose of indicating to his clerks, that another had been signed in lieu of it. Certainly the existence of such a *projet* furnishes some proof that the notary was directed by the parties to prepare such an instrument; and the fact that from that period till the death of Charles Pierre, the family of Jumonville disisted from setting up any claim to him, strengthens the presumption of the genuineness of an original. We are therefore of opinion, that the court did not err in admitting the copy.

The evidence on the part of the mother, does not contradict that act, but rather confirms it. The consideration she alleges she paid, was the same mentioned in the deed, and paid at the same time. The receipt of Moulon does not specify for what purpose the money was paid. No witness is examined to show what was the condition of the bargain between the mother and the executors, and although a sale of a slave, at that time, might be proved by parole, it must be proved by witnesses who could establish the consent of the parties, the price, and other conditions of the contract. If soon after this pretended sale, Charles Pierre had died of a disease existing at the time of the contract, and incurable, would the mother, on the evidence now exhibited, have been entitled to a redhibitory action against the heirs of Jumonville? We think not. The condition and relations of the parties have, ever since its date, conformed to the terms of the deed. While Charles Pierre was a minor, the mother exercised a control over him; but on attaining the age of majority, he appears to have acted as if *sui juris* in her presence, and with her assent. The very copy in question must have been in his possession, for more than twenty

years, as it is shown that the witness, in whose hand writing it is made out, has been dead for that length of time. He was at that time a minor, and the fair presumption is, that he obtained the paper, not from the notary, but from his mother.

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It is further contended, that even if the copy be admissible, it is not legal proof of emancipation, because the Spanish law required five witnesses to such an act. In the case of *Bazzi vs. Rose et al.*, 8 Martin's Reports, 149, this court held, that as between the master and the slave, five witnesses are required by Partida 4, title 22, lib. 1; but it does not follow, that a stranger has a right to set up such a nullity, which the Partida does not declare to be an absolute one. Whatever weight we might attach to this objection, if urged by the heirs of Jumonville, it is not entitled to much consideration, when pressed by a mother, and whose own title to freedom rests on a similar act, as shown by the record.

The further objection that this evidence was inadmissible, because the defendant had not pleaded his emancipation by such an act, has no weight with this court. He alleges that he was free, and that he had been free for many years. In support of that allegation, he was authorised to avail himself of any legal evidence in his favor; and parties are not bound, in their pleadings, to specify the proofs on which they intend to rely.

Where a person of color alleges he is free, and has been so for many years, he will be allowed to avail himself of any legal evidence in his favor, under this plea, without being bound by the pleadings to specific proofs.

The remaining alleged ground of nullity of the will, is, that one of the witnesses was not a resident of the parish of Orleans, when the will was executed. Upon this question, which is one of fact only, there is much discrepancy in the evidence. One thing, however, is clear, that until a short time at least before the will was executed, the witness had been for many years domiciliated in the parish of Orleans. He was himself examined on the trial of this case, and swore that his residence was still, at that time, in the parish of Orleans. The evidence does not satisfy us, that he had changed his domicil at the time alluded to, and according to the principles recognised by this court, in the case of *Waller vs. Lea*, 8 Louisiana Reports, 315, the witness, for aught that

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It is, therefore, ordered, adjudged and decreed, that the judgments rendered in these cases, be severally affirmed, with costs.

The counsel for the plaintiffs presented a petition for a re-hearing in this case, which, on consideration, the court refused.

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APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT.

The sale of the property of a minor, by his curator *ad bona*, when there is no ratification or concurrence of the minor, after he came of age, will be regarded as a nullity.

The plea of prescription of ten years' possession, under a just title and sale, of minors' property, will not avail, where the entire ten years have not elapsed since the minors came of full age, and before commencement of suit.

This is a petitory action. The plaintiff sues to recover a tract of land, six arpents front and forty in depth, situated on Carr's creek, in the parish of East Feliciana, which he alleges, is in the possession of the defendant, together with the original Spanish titles, and which he detains illegally, and unjustly, although amicably demanded to surrender them up. He alleges that he derives his title by purchase, evidenced by authentic act, through several persons, by a complete claim of title, from one Higgins, to whom the land was granted by the Spanish government. He prays judgment, decreeing him the possession of said titles and the

land, and that he may be declared to be the true owner thereof. EASTERN DIST.
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The defendant pleaded a general denial, and alleged he was in possession by a just and legal title, and pleaded the prescription of ten years, &c.

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The plaintiff offered in evidence, a Spanish order of survey, granted by Governor Gayoso, in 1798, and plat and certificate of survey by Trudeau, in 1799, of 480 arpents of land, on Carr's creek, to James Higgins. He further proved by Doctor James Raoul, that James Higgins died, and willed the tract of land, one half or 240 arpents, to his eldest son, John Higgins, and the other half, 240 arpents, to his wife, Sarah Higgins, and all his stock and personal property to his younger sons, William and James Higgins. Mr. N. Johnson, witness for plaintiff, was well acquainted with Higgins. After his death, his wife married Taylor, and had two daughters; the eldest went to look after the land, after the mother's death, which they inherited from her, and which she inherited from her husband. James Saunders knew Mary Taylor, now wife of Ursin Bourgeois, and Hannah Margaret Taylor, now wife of Wm. Blocker, both daughters of Mrs. Sarah Higgins, late wife of Taylor, by the second marriage. He knew John, William and James Higgins, half brothers of Mrs. Mary Taylor, by the mother's side; they all three died during the siege at New Orleans, in 1815.

On the 21st November, 1829, Mary Taylor, wife of Bourgeois, sold the land now in contest, being one half of the Higgins tract, containing 240 arpents, to the present plaintiff for two hundred and fifty dollars, evidenced by public act, passed before the parish judge, of the parish of St. Mary, in which the vendor declares that it is land inherited by her from her half brothers, John, William and James Higgins, deceased. This completes the plaintiff's title.

The defendant claims under the same original title. On the 3d February, 1814, Wm. Higgins and the curator *ad bona* of James Higgins, sold and conveyed by authentic act, all their interest, right and title, in and to the Higgins tract,

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of four hundred and eighty arpents, to James Freeland, for four hundred dollars. On the 16th of February, 1831, Mrs. Hannah Blocker, sister of Mrs. Taylor, now wife of Bourgeois, sold and conveyed all her interest in said land, to Mathew Bethany, the defendant; and on the 9th April, 1819, James Freeland, for the consideration of two thousand five hundred dollars, sold all his interest in this land, consisting of four hundred and eighty arpents, to the defendant. Upon these issues and titles the parties went to trial.

The case was submitted to a jury, who found a verdict for the defendant. The plaintiff moved for a new trial on the following grounds.

1. That the court rejected legal and proper evidence offered by the plaintiff.

2. The verdict is contrary to the evidence in not giving the land to the plaintiff. He is at least entitled a portion, if not all the land claimed.

3. Manifest injustice has been done.

The motion for a new trial was overruled, and judgment rendered in conformity to the verdict. The plaintiff appealed.

Turner, for the plaintiff.

1. We claim this land under a deed from Mary Taylor. She inherited it from her mother, Sarah Higgins, and her half brothers, John, William and James Higgins, and half sister Nelly Higgins.

2. The defendant claims and opposes the right of the plaintiff under a plea of prescription and possession, under a deed from Wm. Higgins and Bohannon, the curator *ad bona* of James Higgins; and also a deed from Hannah Blocker. This comprises his title to the *locus in quo*.

3. The defendant cannot avail himself of the plea of prescription, because a portion of the title he sets up, to wit: that derived from James and Wm. Higgins, is shown to be fraudulent; and it further appears that he was not in possession ten years before the commencement of this suit, and one of the heirs, Mary Taylor, was a minor until 1823 or 1824.

4. It is not shown that Bohannon was the curator *ad bonâ*, of J. Higgins, and if it was, he had no authority to sell and convey the property of a minor. EASTERN DIST.
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5. The deed from Hannah Blocker, conveys no title. She was a natural child, and could not inherit, where there were legitimate children. The marriage of her mother, with Taylor, did legitimate her, because it is not shown that she was acknowledged by Taylor to be his daughter. *Louisiana Code, articles 913, 221 and 224.*

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6. It is believed that under the Spanish law, an express acknowledgment was required to legitimate a child born before marriage. *Civil Code 152, articles 31, 32, 33, 34.*

7. There is another objection to the deed of Mrs. Blocker. She was a married woman, and resided out of the state; the authority of the parish judge was not given in due form, and the husband did not join in the act of sale. *Louisiana Code, articles 124, 127, 129 and 1775.*

Ripley, for the defendant.

Bullard, J., delivered the opinion of the court.

The plaintiff, as vendee of Mary Taylor, sues to recover a tract of land of two hundred and forty arpents, in possession of the defendant, to which she alleges title by inheritance, from her half brothers, John, William and James Higgins, and her mother Sarah Higgins.

It appears that a tract of four hundred and eighty arpents, of which the land in dispute is a part, was granted to James Higgins. At his death, in 1800, his eldest son John inherited one-half, and the other half was retained by the widow. Parole evidence of such a distribution of the estate was received without opposition, and the present controversy relates only to the widow's half.

She had four children by her first husband, to wit: John, William, Nelly and James. She afterwards married John Taylor, by whom she had two children; Mary, Mrs. Bourgeois, and Hannah, Mrs. Blocker. It is left doubtful at

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What time Nelly died without issue, nor is it material to inquire, because if she died before her mother, the latter became her heir; if afterwards, her full brothers inherited to the exclusion of her half sister. On the death of Sarah Higgins, the mother, in 1807, she left five children equally entitled to participate in her inheritance, viz: John, William and James Higgins, and Mary and Hannah Taylor.

The plaintiff has, therefore, shown a title in his vendor to one-fifth of the tract in dispute, by direct inheritance from Sarah Higgins, her mother, of which she does not appear ever to have divested herself.

John, William and James Higgins, the half brothers, died about the same time, in 1815; William survived his two brother, and inherited whatever remained of their property, to the exclusion of the half sisters. On his death, the two half sisters inherited from him.

The sale of the property of a minor, by his curator *ad bona*, when there is no ratification or concurrence of the minor, after he came of age, will be regarded as a nullity.

The defendant has exhibited no conveyance from John, of his share, derived from his mother. William had already sold his share to Freeland, who conveyed to the defendant. But the sale of Bohannon as curator of James, must be regarded as a nullity; neither his concurrence nor subsequent ratification is shown. We are of opinion, that the defendant has shown title to one hundred and forty-four arpents of the land in dispute; having acquired William's full share of forty-eight arpents, Mrs. Blocker's share also of forty-eight arpents, and one half of the shares of John and James, under the deed of Mrs. Blocker. The plaintiff is, therefore, as vendee of Mrs. Taylor, entitled to recover ninety-six arpents, or two undivided fifths of the land, to wit: forty-eight arpents in her own right by direct inheritance from her mother, and one-half of each of the shares of her half brothers, John and James, each twenty-four arpents.

But it is contended that Mrs. Blocker is not proved to be a legitimate child, and that consequently Mrs. Bourgeois inherited to her exclusion. It is shown that the two sisters divided between them the property left by the three Higgins in Attakapas, and we are of opinion, that the evidence does not authorise us to pronounce her incapable of inheriting,

more especially as her legitimacy is not directly questioned by the pleadings.

The plea of prescription cannot, in our opinion, avail the defendant, as it is shown that the plaintiff's vendor could not have been of age, until the year 1823 or 1824, and the present suit was instituted in 1830.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and it is further adjudged and decreed, that the plaintiff recover of the defendant two undivided fifths of the tract of land of two hundred and forty arpents in controversy, with costs in both courts; reserving to the defendant his right, if any he have, to be paid for improvements.

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The plea of prescription of ten years' possession, under a just title and sale, of minors' property, will not avail, where the entire ten years have not elapsed since the minors came of full age, and before commencement of suit.

WEEKS vs. FLOWER ET AL.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE OF THE EIGHTH PRESIDING.

9L	379
50	200
9L	380
52	984

Where a purchaser is in possession under a conveyance, the question of fraud cannot be inquired into collaterally, in a case commencing with a seizure; the party complaining must bring a direct revocatory action.

Where a plaintiff in injunction, sues for vindictive damages, alleging his possession of the property seized and which he has enjoined, the defendant may repel the action, by showing that the contract of sale under which the plaintiff claims and bases his right, is a simulation, and intended to cover the property from the defendant's claim against the true owner.

The plea of *litis pendentia* is a declinatory exception, which comes too late after the swearing of the jury. In order to avail the party, it must show the pendency of another suit, between the same parties, for the same object, growing out of the same cause of action, before another court of concurrent jurisdiction.

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A continuance will not be granted after the trial has commenced and evidence gone into, on account of sickness of counsel. It is too late at this stage of a cause, to pray for a continuance.

This suit commenced by injunction. It appears the defendants, under a judgment which they had obtained against one Rachel O'Connor, in 1832, caused an execution to issue, directed to the sheriff of the parish of West Feliciana, and instructed him to levy on ten bales of cotton, besides other cotton in the gin house and in the field, and on twenty-six slaves, all of which is alleged to be the property of the petitioner, and which he alleges the defendants knew belonged to him, but nevertheless, caused it to be seized under the pretext that it belonged to the defendants in execution. He further states, that the sheriff has advertised said property for sale; wherefore, he prays for an injunction to restrain and prohibit said sale, and that it may be declared to belong to him, and that he have judgment for five thousand dollars in damages which he has sustained in consequence of said illegal seizure. An injunction was granted as prayed for. The defendant admits the seizure of the property in contest, but avers that after the institution of his suit against Mrs. O'Connor, and before he obtained the judgment on which execution issued, under which the property was seized; she, with the intent to defraud her creditors, especially the defendant and his co-partner David Flower, colluded and confederated with the plaintiff to prevent the recovery of their just debts; and on the 5th of June, 1829, conveyed to the plaintiff, by act under private signature, nineteen slaves; and on the 15th of March, 1830, she conveyed to said plaintiff, by public act passed before the parish judge of West Feliciana, the tract of land on which she resided, her stock of horned cattle, horses and sheep, and thirty slaves, &c., being property she then possessed, for the aggregate sum of nine thousand dollars, &c., without leaving sufficient property to pay her debts, &c. The defendants charge that said acts of sale are fraudulent, as well on the part of the plaintiff, who had notice of the defendants' claims, as Mrs. O'Connor, and made in collusion between them; that said pretended

sales were made without a fair and legal consideration, and no delivery of the property sold was ever made to the pretended purchaser. He prays that the property seized be declared to belong to Mrs. O'Connor, and liable to his execution, and that the injunction be dissolved.

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The plaintiff moved to strike out of the answer the part which charges fraud, want of consideration, and invalidity in the said acts of sale, because they cannot be tried in this form of action; the validity of the sales cannot be tested by the seizures which are enjoined, but in a direct action to annul and set them aside.

The court overruled this motion and allowed the entire issue to go before the jury. The decision of the court was excepted to. The plaintiff renewed his motion to strike out, on the further trial of the cause, on the ground that the matters embraced in said answer are the subject of another suit between the defendant and the plaintiff herein, which has for its object the cancelling of said sales as the identical grounds alleged in this. The court overruled the motion, which opinion of the court was excepted to.

While the trial was in progress, the sole counsel for the plaintiff spread upon the record a statement that he was incapable from indisposition to discharge his duty to his client, and prayed the court to postpone the further trial of the case from Saturday morning until the following Monday, which was refused, and a bill of exception taken to the decision of the court.

Parole evidence was received to prove the circumstances attending the levy made on the property in contest; and also to show the manner in which the sales of said property were made to the plaintiff, Weeks.

The jury returned a verdict for the defendants; upon which the court rendered judgment, dissolving the injunction, and decreeing the plaintiff to pay costs. He appealed.

Conrad, for the plaintiff.

1. The injunction should have been made absolute until the sale from Rachel O'Connor to the plaintiff, had been

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revoked by a direct action instituted for that purpose. The property conveyed by it could not be seized for a debt of the vendor. *Louisiana Code, articles 1964, 1965, 1966. 5 Martin, N. S., 362. Ibid. 633. 6 Martin, N. S., 137, 580. 6 Ibid. 324. 2 Louisiana Reports, 214.*

2. Even supposing that the bill of sale in this case, should be considered as a mere act *sous seing privé*; in consequence of any defect in its form, still the distinction which has been drawn between authentic acts and those under private signature in relation to this subject, will not avail the defendants in this case. That distinction, though not expressly recognised in those articles of the Code which grant the revocatory action, and regulate its exercise, has been founded by this court on two considerations. 1st. Because third persons could not be presumed to have knowledge of alienations made *sous seing privé* not recorded. 2d. That such instruments have no legal date, except that of their production in court. Now neither of these considerations applies to the present case. The sale, even supposing it defective in form, formed a part of the record of the parish judge's office, and conveyed as full information of the fact, as if it had been perfect in point of form. *Martel vs. Trudeau's heirs*. Besides an authentic act, or one *sous seing privé*, duly recorded, only creates a presumption of knowledge, frequently unfounded in fact, and this court has frequently held that actual knowledge is equivalent to registry, and dispenses with the proof of it. *2 Martin, N. S., 171. 4 Ibid., N. S., 378. 8 Ibid., N. S., 140. Louisiana Code, article 2242.*

3. Now, the evidence on the record fully establishes that the defendants were fully apprised of the sale, long before issuing the *fieri facias*, and that in fact at that very moment a suit instituted by them long before, to set aside the sale, on the same grounds on which it is attacked now, was still pending.

4. In their answer in this suit, they in fact admit that there was a sale by authentic act. But they certainly admit both in that answer, by their indemnity bond to the sheriff, &c., that a sale of the property had been made.

5. As to the second ground of distinction, the want of a date to instruments under private signature, the date of the present one is fully established to have been what it purports to be. On this point the attestation and signature of the judge, or sworn officer, acting in the performance of his legal functions, must distinguish this act from an ordinary one *sous seing privé*. Although this signature may not invest it with the character of an authentic act, it certainly gives to it some additional faith and credit, in deciding on the mere fact of its genuineness. But independent of this, its date is established by the testimony of Swift and Johnson, and by the suit instituted to annul it a long time previous to the seizure, and by the indemnity bond.

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6. But lastly, the property was delivered to plaintiff's overseer; the possession of the last was that of their employer: "*qui possidet per alium, possidet per se.*" See *Louisiana Code*, article 3396. The plaintiff has, ever since the sale been exercising unequivocal acts of ownership over the property sold, and the place was entirely under his control; the overseers employed and paid by him; some of the negroes sent to another plantation owned by him in a distant part of the state; the crop marked in his name and consigned by him to his merchant in this city, sold on his account and the proceeds placed to his credit.

The cotton seized had certainly been delivered to him before the sale. *Louisiana Code*, article 2243. *Digest*, lib. 39, title 5, ls. 6 and 13. *Ibid.* 18, title 6, l. 14.

Worthington, for the defendant, made the following points in argument:

1. The sale from Mrs. O'Conner to the plaintiff, Weeks, was a fraudulent sale, made with a deliberate intention to defraud her creditors, and particularly the defendant to this action.

2. That a sale made with a deliberate intention to defraud either, avowed by the parties to such sale, or found by a jury, is null and void, and can communicate no title to the fraudulent vendee. 2 *Louisiana Reports*, 78. 6 *Toullier*, 395.

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3. That in all cases where the plaintiff claims a right under such conveyance, that right may be attacked by the introduction of evidence to show the fraud, and the consequent want of title in the plaintiff.

4. That if there is any thing in the jurisprudence of this state, which conflicts with this right, it is confined to cases where the possession, real and *bonâ fide*, accompanies the deed.

5. That here there was no valid possession taken by the vendee.

6. That this was an action for vindictive damages, in which the defendant was entitled to exhibit a want of possession and title in the plaintiff.

Bullard, J., delivered the opinion of the court.

The plaintiff, David Weeks, alleges, that the defendants, W. & D. Flower, having obtained a judgment against Rachel O'Conner, caused a *fieri facias* to issue, and that the sheriff had levied on certain cotton and slaves, which they well knew to be the property and in possession of the plaintiff. He prays a judgment for five thousand dollars damages, and an injunction.

The defendants deny that the plaintiff was in possession of the property at the time of the seizure, and they allege, that there was a simulated sale from their debtor, Rachel O'Conner, to her brother, the plaintiff, entered into collusively with a view of defrauding them, and that the pretended vendor always retained possession. They pray that the property seized may be declared to be that of Mrs. O'Conner, and subject to their seizure.

The case was tried by a jury, whose verdict was in favor of the defendant, and the plaintiffs appealed.

The plaintiff's counsel moved the court to strike out all that part of the defendant's answer, which alleges fraud and want of consideration, and invalidity in the sales from Mrs. O'Conner to Weeks, on the ground that these questions could not be tried in this form, and tested by a seizure in the first instance. This motion being overruled, he excepted,

and the case turns principally on the correctness of that ruling of the District Court.

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Where a purchaser is in possession under a conveyance, the question of fraud cannot be inquired into collaterally, in a case commencing with a seizure; the party complaining must bring a direct revocatory action.

It has been settled by repeated decisions of this court, that when a purchaser is in possession under a conveyance, the question of fraud cannot be inquired into collaterally, commencing with a seizure; but the party complaining must bring a direct revocatory action. 5 *Martin, N. S.*, 361.

We are still satisfied, that the principle is a correct one; but it will be found, that in all the cases which have turned upon that principle, the purchaser was in possession. If effect were given to a conveyance, alleged to be collusive and simulated, and not accompanied by possession, it would be a clear violation of that provision of the code, which declares, "that the sale of immoveables or slaves, made under private signature, shall have effect against the creditors of the parties, and against third persons in general, only from the day such sale was registered in the office of a notary, and the actual delivery of the things took place."

Louisiana Code, 2417.

The present case differs, in some essential particulars, from any other which has heretofore come before this court. In the first place, the plaintiff sues for vindictive damages, alleging his possession, and that the defendants well knew that he was the owner and possessor. With a view of repelling this action for damages, which is rather one of trespass than a mere opposition and injunction, to be tried summarily without a jury, the defendants had, in our opinion, a right to allege and show that the pretended vendor was in fact still in possession, and that the contract on which the plaintiff bases his right, was but a simulation, and intended to cover the property from the defendants' claim. No objection was made to the questions presented by the pleadings, being tried by a jury, and the possession of the plaintiff was necessarily one of the issues submitted, as well as the knowledge on the part of the defendants, that the property did belong to the plaintiff. We are, therefore, of opinion, the court did not err in overruling the motion.

Where a plaintiff in injunction sues for vindictive damages, alleging his possession of the property seized, and which he has enjoined, the defendant may repel the action, by showing that the contract of sale, under which the plaintiff claims and bases his right, is a simulation, and intended to cover the property from the defendant's claim against the true owner.

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The plea of *litis pendentia* is a declinatory exception, which comes too late after the swearing of the jury. In order to avail the party, it must show the pendency of another suit between the same parties, for the same object, growing out of the same cause of action, before another court of concurrent jurisdiction.

A continuance will not be granted, after the trial has commenced and evidence gone into, on account of sickness of counsel. It is too late, at this stage of a cause, to pray for a continuance.

There is a second bill of exceptions to the refusal of the judge to reject the same matters of defence, on the ground that there was another suit pending, in which the defendant in this case seeks to avoid the sale from Mrs. O'Conner to Weeks, on the ground of fraud. This second motion to strike out, was made after the swearing of the jury, and in our opinion came too late; but even if it had been made in proper time, we are not satisfied that the exception ought to have prevailed. The exception of the *litis pendentia*, does not appear to us to apply in a case of this kind. It is a declinatory exception, and in order to avail the party, it must show the pendency of another suit between the same parties, for the same object, and growing out of the same cause of action, before *another court of concurrent jurisdiction*. *Code of Practice, article 335.*

A third bill of exceptions was taken to the refusal of the judge to continue the cause on affidavit, after the trial had commenced, on the ground of illness of one of the counsel, and that his colleague had retired from the court, on account of having received intelligence of a recent domestic calamity. Such motions are always addressed to the sound legal discretion of the court; but this court has often decided, that after the trial has been gone into, and evidence heard, it is too late to pray for a continuance. *12 Martin's Reports, 635.*

On the merits, the cause was tried by a jury, upon the issue joined in the pleadings, and the judgment of the court founded on the verdict, was, that the injunction should be dissolved. Nothing was decided as to the title of any part of the property, except that which had been under seizure. The evidence appears to have satisfied the jury, that the sale from Mrs. O'Conner to Weeks was not real, but simulated, and that the property seized had not been delivered to the plaintiff, and was still liable to be seized in execution, at the suit of her creditors. It does not appear to us, that justice requires the interference of this court with the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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PANDELLY vs. HIS CREDITORS.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

9L 387
51 941

In cases of opposition to the appointment of syndics, the question is not whether the proceedings before the notary shall be homologated, (which do not require a judgment of homologation,) but whether the opposition shall be sustained, on the ground that the syndics were not elected by a majority of legal votes.

The proceedings of creditors before a notary, in appointing syndics, are not vitiated because some illegal votes are given. They are to be struck out from the proceedings.

The creditor may prove his claim, and vote for syndics by proxy, or an agent, who can swear to the fact of the debt being due and owing, of his own knowledge.

Any evidence which satisfies the notary of the authority of an agent to vote for syndics, is *prima facie* good, and when no objection is made, he cannot refuse the vote; but the notary is not to decide on the reality of the debts, and if he did, it would not conclude the other creditors.

Creditors, not making opposition to votes for syndics before the notary, may do so within ten days after the proceedings are returned into court; but then the burden of proof is on the opposing creditor, to show the illegal votes.

The principle, that claims of creditors on which they vote may be investigated previously to the homologation of the appointment of syndics, is confined to cases of forced surrender, according to the Spanish law. The statute of 1817, relating to voluntary surrenders, requires only *ex parte* evidence of the debts, previous to voting for syndics.

The majority in amount, required to elect a syndic, when there are more than two candidates, is not an absolute majority of all the votes given, but only a plurality or the highest number.

It is only on an opposition to the tableau of distribution, that the validity and relative rank of debts is to be finally and contradictorily tried between all the creditors.

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This case comes before the court on the opposition of several creditors united, to the proceedings of the creditors before the notary, by which John D. Bein and Joseph Le Carpentier were appointed syndics of the creditors of the insolvent debtor.

The insolvent presented his petition and bilan to the district judge, and prayed leave to make a surrender of his property, for the benefit of his creditors, and obtain the benefit of the insolvent laws.

The cession of his property was accepted, and a meeting of the creditors took place before a notary, who presented their respective claims, and voted for syndics. These proceedings were returned by the notary into court, on the 6th June, 1835, and on the 16th of the same month, Tricou and several other creditors united, presented an opposition to the appointment of the syndics, as being illegal, on the following grounds :

1. Two votes are recorded by the firm of Reynolds, Byrne & Co., one given by C. Briggs, acting for the firm, on a claim of twenty-four thousand six hundred dollars, for John D. Bein, as sole syndic ; the second by James Peuch, acting under a power of attorney, on twenty-five thousand dollars, for J. D. Bein and J. Le Carpentier, as joint syndics. These votes are alleged to be illegal, because the creditors have not certified upon oath, that their claim was true and legitimate, and because no creditor can take the oath and vote by proxy for syndics, &c.

2. The same objections are made to a large sum voted on by different creditors, in the same way, all being given for Bein and Le Carpentier. They pray that these votes be all declared illegal, and that Claude Samory, who had also a large vote, be declared the sole syndic.

The votes, as returned by the notary, stood one hundred and seventy-two thousand five hundred and eighty-five dollars for Bein and Le Carpentier, ninety-six thousand seven hundred and eighty-one dollars for Claude Samory, forty-seven thousand three hundred and fourteen dollars for John D. Bein alone, fourteen thousand three hundred and

twenty-three dollars for J. Le Carpentier alone, and two thousand one hundred and twenty-six dollars for Le Carpentier and Samory. The notary returned Bein and Le Carpentier as elected joint syndics.

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The district judge, in deciding on this opposition, determined that the proceedings were illegal, and that another meeting of creditors take place on a day to be fixed, unless an appeal was taken within ten days, and that the notary receive no votes of creditors, under powers of attorney, unless such power is accompanied by notarial acts, nor, unless the oath be made of the debt by the creditor, except in cases where the creditor is absent, or under such circumstances that he cannot take the oath; and in such cases, the attorney or some competent person must make oath of personal knowledge of the existing indebtedness.

From this judgment, the opposing creditors and the syndics appealed.

Morphy, for the syndics.

1. The opposition now made to the right of creditors, to present their claims and have them sworn to, by an agent or attorney in fact, and vote by proxy, should have been made before the notary, to enable the creditor whose claim and right was contested; to apply a remedy, either by appearing in person or perfecting the authority under which the agent acted. *Seghers vs. His Creditors*, 10 *Martin*, 544.

2. The provision of the Louisiana Code, article 3055, which authorises the creditors to appear successively before the notary, and which, it is contended, prevents opposition from being made before the notary, only applies to cases of a forced *respite*, which requires three-fourths of the creditors in number and amount to grant it.

3. The oath required by a creditor, in presenting his claim before the notary, need not be made in person. It may be done by an agent or attorney in fact. It is only received as *prima facie* evidence of the claim, at the time of voting; and the vote of the creditor for syndics can be given by proxy.

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4. The opponents assert that Samory was elected by a majority of legal votes, and that he should have been declared the syndic. This they have not shown; they are bound as much to show, that his votes were founded on real debts and legally given, as we are on behalf of the syndics, who were declared to be legally elected.

5. A debt, evidenced by the note of the insolvent, is sufficient proof before the notary, to recognize the claim and allow the holder to vote thereon.

6. A creditor who swears to his debt, due on a contract for building, which the insolvent failed to execute, should be allowed to vote, although his claim may be afterwards disputed.

7. The strict proof, which the opponents in this case contend must be made, of all claims presented against the insolvent's estate, is only required to be made on the trial of the opposition that is made to it, contradictorily with all the creditors. In this case they are all plaintiffs and defendants, and then every claim that is contested, must be legally proved and substantiated. But the votes in this case for syndics were properly given, on preliminary and *prima facie* proofs and evidence, and Messrs. Bein and Le Carpentier were duly appointed syndics.

D. Seghers, for the opposing creditors.

1. The counsel for the syndics makes a mistake in applying the doctrines of 10 Martin, 54, to his case. The doctrine there laid down, only relates to opponents who have not made their objections at the meeting of creditors before the notary, to the votes given by proxy; but that case does not extend to the mode in which debts are to be proven.

2. The doctrine of opposing illegal votes, at the meeting before the notary, seems at variance with the 18th section of the act of 1817, concerning voluntary surrenders. It expressly provides, that this opposition shall be made before the court, by a written *deposition*. 2 *Moreau's Digest*, 429.

3. This court has declared in a subsequent part of the same volume, (10 Martin, 697,) in the same case, that it is

the duty of the notary to record and send up the evidence, on which he receives the claims of the creditors, so that it can be acted upon by the court.

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4. It is in vain the counsel for the syndics contends, that the provision in the Louisiana Code, article 3055 applies only to forced respites, when the creditors are only to meet successively, and put in their claims and votes without deliberating together; when by the 8th section of the insolvent act of 1817, the creditors are to be called in the manner, and within the time prescribed for respites, and the Louisiana Code, article 3056, says, "when the creditors refuse a respite, a cession of property ensues, and that the proceedings continue," as in case of a surrender.

5. The learned counsel admits, the oath of the creditor before the notary, either by himself or by proxy, is only *prima facie* evidence of the debt, and which admits the notary is incompetent to pass on contested claims. The law makes the votes of a majority of *claims* sufficient to elect the syndics; consequently, as the creditors *all* have a vital interest, that the property shall not go into unfaithful hands, they have a right to scrutinize these votes before the court, and see that they are all legal.

6. The insolvent act of 1817, section 14, provides that "at the meeting of creditors, the latter, after having certified upon oath their respective claims to be true, &c., shall proceed to the appointment of one or more syndics, &c." This involves two requisites: 1st. The oath to be taken by the creditor personally; and 2d. That it must be taken at the meeting, and before voting for syndics. It is as imperative that the creditor take the oath before voting, as it is, that the opposing creditor shall make his written deposition before the court, setting forth the nullity of the election of syndics, within ten days after such appointment.

7. The creditors cannot vote for syndics by proxy. The 3d section of the act of 1817, requires that the insolvent shall include in his schedule, the names of all his creditors, &c., and the 14th section says, these creditors are to come forward and certify on oath their respective claims, *before*

EASTERN DIST. they proceed to vote for syndics. The reason of this is, that
April, 1836. fraud is presumed in cases of insolvency. 8 *Louisiana*
PANDELLY *Reports*, 319.

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8. The votes, or many of them, by which Bein and Le Carpentier were elected, being shown to be illegal, Claude Samory should be declared elected sole syndic.

Sterrett, for the syndics, in conclusion.

1. The law contemplates, that the creditors should appoint some one or more persons, in whom they have full confidence, to be syndics, and take charge of the debtor's property. This they have done in the present case, as evinced by their votes, and Bein and Le Carpentier are clearly chosen, by a large majority.

2. The court below was, therefore, clearly wrong, in referring this matter to another meeting of creditors. It can only cause delay, for Bein and Le Carpentier would receive the same, or a greater number of votes, and in the meantime the property is wasting. The interest of all is to acquiesce in the result of the first meeting, which is believed to be legal, and as far as the opponents are concerned, they make, at best, but an improbable case.

3. It will be seen, by reference to the record, page 48, that Tricou and others of the opposing creditors withdrew their opposition to Bein and Le Carpentier as syndics. These creditors represent, in their own right, (and one of them as agent,) claims, on which they *voted at the meeting*, to the amount of eighty-three thousand five hundred dollars. These votes were given to Samory alone; and deduct this from the remainder given for him at the meeting, and but thirteen thousand two hundred and eighty-one dollars remain. The proceedings should remain as they were returned from the notary.

Bullard, J., delivered the opinion of the court.

This is an opposition to the appointment of syndics, on the ground that the nomination was not legally made before the notary. The 18th section of the act of 1817, relative to

voluntary surrenders, authorises such opposition within ten days after the appointment of syndics. Before we proceed to examine the particular objections to the proceedings had before the notary in this case, we will remark that the preceding section of that act requires that a copy of the *procès verbal* of the deliberations of the creditors, should be filed in court, and it shall no longer be necessary to proceed to the homologation of such deliberations. The appointment of syndics does not require the sanction of the court, and in case of opposition, the question is not whether the proceedings shall be homologated, but whether the opposition shall be sustained; or, in other words, the opposing creditors must show that the persons returned by the notary, as syndics, were not elected by a majority of legal votes.

It appears by the notary's return that creditors representing an amount of one hundred and seventy-two thousand five hundred and eighty-five dollars, voted for Bein and Le Carpentier. The next highest candidate is C. Samory, who received votes to the amount of ninety-six thousand seven hundred and eighty-one dollars. The opposition cannot be sustained, unless the opposing creditors show that the syndics returned, received so many illegal votes as if rejected, would leave them with a minority. It cannot be pretended that the whole proceedings are to be annulled, because some illegal votes were received. Such votes may be rejected, but if the syndics returned as elected have still a majority, independently of them, the opposition grounded on the illegality of the election, must fall. The opposing creditors must, therefore, show that Bein and Le Carpentier received illegal votes, representing more than seventy-five thousand eight hundred dollars of debts, the difference between the vote of Samory and theirs.

The opposition in this case rests mainly on the principle contended for by the counsel, that no oath by proxy, can legally qualify a creditor to vote for syndic, and that the pretended powers of attorney, produced by such proxies, are insufficient.

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In cases of opposition to the appointment of syndics, the question is not whether the proceedings before the notary shall be homologated, (which do not require a judgment of homologation,) but whether the opposition shall be sustained, on the ground that the syndics were not elected by a majority of legal votes.

The proceedings of creditors before a notary, in appointing syndics, are not vitiated because some illegal votes are given. They are to be struck out from the proceedings.

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The creditor may prove his claim, and vote for syndics by proxy, or an agent, who can swear to the fact of the debt being due and owing, of his own knowledge.

That the debt may be proved by the oath of an agent or proxy, in these preliminary proceedings, has often been recognized by this court, whenever the proxy swears to the fact, as of his own knowledge. There may be cases in which the principal is personally ignorant of the existence of the debt, as when sales are made by factors for and in the name of principals living abroad. We cannot admit the principle contended for by the opposing creditor, that the power of attorney should contain or express authority to swear for his constituent. In the case referred to by him in the Louisiana Reports, 425, *Foucher vs. His Creditors*, we held that an agent could not make the oath required from an insolvent debtor as preliminary to his surrender, and to obtain a stay of proceedings against his person and property. It is manifestly impossible for an agent to swear that the insolvent has withheld no part of his property from his creditors. That is a matter which the insolvent alone can know. There is a great difference between swearing for and in the name of another, and swearing in support of another's rights upon facts within the personal knowledge of the affiant.

But it is contended, on the part of the syndics, that no objection was made before the notary to that mode of proof, and that this court held that the case of *Seghers vs. His Creditors*, 10 Martin's Report, 54, that they would not listen to objections which the opponents had an opportunity to make before the votes were received, and failed to make.

To this the counsel for the opposing creditors answers: 1st. That in the case alluded to there had already been a meeting of the creditors, and the proceedings had been homologated without opposition; and 2nd. the creditors since the promulgation of the Code of Louisiana, are no longer required to meet all at the same time, but may appear successively before the notary, and that they have no opportunity to make objections.

It does not appear to us that the first answer is satisfactory, or that the cases can be well distinguished. By the homologation spoken of in that case, could only be meant that no

opposition had been made, because the statute as we have seen does not require that the proceedings should be expressly sanctioned by the court. If no objection is made before the notary, the only inquiry on an opposition is, whether the notary erred in permitting persons assuming to be creditors to vote. He has before him the bilan containing a sworn list of the creditors, and he is bound to require that the debts should be sworn to before any person is permitted to vote. Any evidence which satisfies him of the authority of an agent, is *prima facie* good, and when no objection is made we do not well see how he could take upon himself to refuse a vote. He is not to decide on the reality of the debts, and if he did, it would not conclude the creditors.

But it is said further that no opportunity is offered to make objections, as the creditors are now permitted to appear successively and vote. The statute contemplates a meeting and nothing prevents the creditors from all coming together, or any one of them who may have an interest in so doing, from remaining and making objections as they come forward to vote. If they chose not to make any objections at the time, and afterwards make opposition, they must show that persons voted who had in fact no right to do so, and the burden of proof is on the opposing creditor. If we deviate from the rule settled in the case alluded to, we transfer the contest relative to the syndicism from the notary's to the court room. The case of Planters' Bank *vs.* Lanusse, also referred to in 10 Martin, 690, is entirely different from this. That was a case of forced surrender, which the court decided was not governed by the act of 1817. The principle recognized in that case, that the claims of creditors on which they vote, may be investigated previously to the homologation of the appointment, is confined to cases of forced surrenders according to the Spanish law; but even in that case it is coupled with the condition that the notary must record the proofs each party presents, and return it to the court. The statute of 1817, required only *ex parte* evidence of the debts, previous to voting for syndic.

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Any evidence which satisfies the notary of the authority of an agent to vote for syndics, is *prima facie* good, and when no objection is made, he cannot refuse the vote; but the notary is not to decide on the reality of the debts, and if he did, it would not conclude the other creditors.

Creditors, not making opposition to votes for syndics before the notary, may do so within ten days after the proceedings are returned into court; but then the burden of proof is on the opposing creditor, to show the illegal votes.

The principle, that claims of creditors on which they vote may be investigated previously to the homologation of the appointment of syndics, is confined to cases of forced surrender, according to the Spanish law. The statute of 1817, relating to voluntary surrenders, requires only *ex parte* evidence of the debts, previous to voting for syndics.

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The majority in amount, required to elect a syndic, when there are more than two candidates, is not an absolute majority of all the votes given, but only a plurality or the highest number.

It is only on an opposition to the tableau of distribution, that the validity and relative rank of debts is to be finally and contradictorily tried between all the creditors.

By the majority in amount required for the election of syndic, we understand, not an absolute majority of all the votes given, but when there are more than two candidates a majority in the popular sense of the word, that is the highest number or plurality of votes; such is understood to have been the Spanish law, and recognized by this court, in 4 *Martin's Report*, 307.

The opposition in this case, is to the legality of the proceedings, so far as the election of Bein and Le Carpentier as syndics, is concerned. It is not, therefore, important to inquire into the legality of votes given to other candidates.

It is in our opinion only on opposition to a tableau of distribution, that the validity and relative rank of the debts is to be tried finally and contradictorily between all the creditors, and the law does not contemplate such a scrutiny as preliminary to the nomination of syndics. Suppose creditors did not attend the meeting of creditors, it could not be pretended that they would on the final question upon the tableau, be precluded from contesting the claims of those creditors who had attended and voted, and whose votes had been afterwards declared legal upon an opposition like the present.

According to this view of the case, and of the law which is to govern cases of this kind, even admitting that the objection is well taken to the right of Millaudon to vote on his claim, for unliquidated damages arising *ex contractu*, and that the vote of Reynolds, Byrne & Co., ought to be rejected as double and inconsistent, still Bein and Le Carpentier would remain with more votes than any other candidates; and in our opinion, the opposing creditors have not made good their opposition.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed; the opposition overruled and dismissed, and that the costs of the opposition in the court below be paid by the opposing creditors, and those of the appeal to be paid by the estate.

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Corporations are intellectual beings distinct from the persons who compose them, and are creatures of the law. They can act only according to their organization, in the form or manner pointed out by their charters and the laws of the land.

The estates and rights of a corporation belong to the whole body; and none of the individuals who compose it can dispose of any part of them. The act of the majority of the corporators, legally expressed, is the act of the whole, and no contract is binding on the corporation which is not binding on every member of it.

But the will or assent of a majority of the corporators, taken *separately* and not in full meeting, is not regarded as the will of the corporation itself.

So, where the assent of a majority of the stockholders of a building company was expressed, in relation to a certain transaction concerning the corporation, not in a meeting of stockholders, but by each one separately and at different times, and evidenced not by the minutes of the corporate proceedings, but by a separate paper in the possession of a committee: *Held*, that the proceeding was null and void; as containing no legal evidence of the consent of the corporation, either according to its charter or the general principles of law.

This is an action to recover a sum of money from the New-Orleans Building Company, under an agreement or contract with the stockholders thereof.

The plaintiffs allege, that they became the purchasers of two houses and lots in New-Orleans, which were sold at public auction on the 9th of December, 1834, by said company. That difficulties having arisen in relation to this sale on account of the embarrassments of the Building Company, the latter entered into an agreement with the purchasers, by which it was agreed and determined that the purchasers at the first sale should relinquish their rights and be released from responsibility; and that the property be again sold, and

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the advance or profits arising between the first and second sales, on their respective lots, be paid over to the purchasers at the first sale; provided there were sufficient assets to pay the debts of the company. That in pursuance of this agreement the property in question was sold under an order of seizure and sale, which issued in virtue of a mortgage of Laurent Millaudon, which he had on the property of the Building Company, and the lots and buildings first purchased, produced profits over and above the first sale, to the amount of five thousand two hundred and fifty dollars to one of the plaintiffs, and eight hundred and fifty dollars to the other, for which they pray judgment against the Building Company.

The defendants pleaded a general denial to every thing alleged, except such as are expressly admitted. They expressly allege that the sale of the company's property on the 9th December, 1834, at which the plaintiffs purchased, was illegal; made without sufficient authority, and not binding. That the agreement under which the plaintiffs claim the profits of the second sale, was not made in a manner and form to bind the corporation, or was founded in error and without consideration; that even according to the conditions of the agreement, after payment of the debts of the company nothing remains to the plaintiffs.

Upon these issues and pleadings the parties went to trial. The books containing the minutes of the proceedings of the corporation were produced in evidence, together with all the proceedings of the company in relation to the sales of its property.

The facts material to this case show, that a sale of certain property of the Building Company took place on the 9th December, 1834, at which the plaintiffs purchased lots Nos. 7 and 8, being houses and lots situated in Carondelet-street, the one for twelve thousand two hundred dollars, and the other for twelve thousand six hundred dollars.

Some difficulty occurring about the sale and purchase of this property, between the purchasers and the Building Company, a committee of the stockholders was appointed to

effect a compromise and re-sale of the property under Mr. Millaudon's mortgage. Terms were agreed on, part of which were, that the plaintiffs and other purchasers were to relinquish their purchases under the sale of the 9th December, 1834, be released from liability, and entitled to receive the profits which their respective purchases would produce at the second sale over the first, after paying the debts of the company.

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A meeting of stockholders was held the — day of May, 1835, at which Mr. Yorke, offered the following resolution :

Resolved, That the president and directors be authorised and instructed to cause the property of the company to be sold by the sheriff, under Mr. Millaudon's mortgage, &c., and that the proceeds be appropriated to pay the debts of the company, and that the *arrangement* made by the committee with the purchasers of property at the sales on the 9th and 12th December, 1834, be *confirmed*.

This resolution passed, yeas twelve, representing six hundred and sixty-seven shares. Nays six, representing three hundred and twenty-four shares of stock. The whole number of shares belonging to the company being represented at two thousand and seventy-three.

A resolution was then passed, appointing a committee of two to call on the stockholders who were not represented at this meeting, to give their assent or dissent to the foregoing resolution.

The stockholders not present were called on at different times and places, and finally all gave their assent but two.

The second sale accordingly took place under Mr. Millaudon's mortgage, on the 2d July, 1835. The increase of price between the two sales amounted to the sums claimed by the plaintiffs, on the property they had first purchased and relinquished.

The district judge after an elaborate opinion, came to the conclusion, that the plaintiffs, although their claim was founded in equity, could not recover; that in applying the rules which should govern the proceedings of corporations,

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the compromise and resolutions on which the plaintiffs found their claim, are not binding on the Building Company.

Judgment was given for the defendants. The plaintiffs appealed.

Benjamin, for the plaintiffs.

Eustis and *Carter*, for the defendants.

1. The defendants are a private civil corporation. *Louisiana Code*, articles 420, 421.

2. The corporation is a fictitious being, entirely distinct from the persons composing it. *Louisiana Code*, articles 426, 427, 428.

3. The corporation can only act in its *corporate form*. The acts of the *individuals* composing it, can have no obligatory force on the corporation. The corporation is only bound by its own acts, or those of its lawful agents.

4. In corporations, the act of the majority is considered the act of the whole, *article 435*; but this means the majority of the whole number of stockholders, unless otherwise provided by the act of incorporation, or the by-laws.

5. The sense of corporators, to be obligatory on the corporation, must be taken at a meeting of them, duly convoked, after public notice. The assent or dissent of corporators otherwise given, is not of any effect as to any obligation on the part of the corporation. 18 *Massachusetts Reports*, 297.

6. The notice to be given in all cases of meetings of corporators, unless otherwise provided by the charter or by-laws, must be personal and in writing, and in all cases the object of the meeting ought to be stated, where any thing out of the usual course of business is to be done. *Civil Code*, of the signification of words, *section 23*. 7 *Connecticut Reports*, 214, *New vs. Wise*.

7. In all cases where no provision is made by the charter or the by-laws, they must be regulated by the law of the land. 4 *Littell's Reports*, 433. 5 *Johnson's Chancery Reports*, 378.

8. The several acts or contracts, which the plaintiffs consider as obligatory on the corporation, have not been made in manner and form to bind the corporation, according to the principles herein laid down, for the details of which see the opinion of the district judge.

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Bullard J., delivered the opinion of the court.

The plaintiffs allege that they, or their assignor, purchased certain lots in the city of New-Orleans, at a public sale by the defendants; but that difficulties having arisen in relation to the sale, it was agreed that the property should be sold again; that no liability should attach to the first purchasers; that they, should relinquish their rights to the property and that it should be sold again, and the proceeds applied to the payment of the just debts of the company; and that the surplus, if any, should be paid over to those who had purchased at the first sale and relinquished, each purchaser being entitled to the full profit made on his lot, provided the assets of the company should be sufficient to pay all its debts, independent of such profits. They allege that the second sale produced a large profit over and above all the debts of the corporation, and that they have a right to claim the profit made on the re-sale of their lots respectively, and they pray for judgment against the corporation of five thousand two hundred and fifty dollars, in favor of one of the plaintiffs, and of eight hundred and fifty dollars in favor of the other.

The defendants in this action allege, that the first sale spoken of in the petition was illegal, and made without sufficient authority, and that the agreement stated in the petition was not made in a manner and form to bind the corporation; and if so made, was founded in error and without consideration, and is not obligatory.

Judgment having been rendered in favor of the defendants, the plaintiffs appealed.

We have not thought it necessary to inquire in this case, whether the sale of the 9th and 12th of December, was valid or not. The plaintiffs appear to have renounced all claim under it, and the obligatory force of the contract which they

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now seek to enforce, does not in our opinion depend upon the question whether they acquired a good title under the first sale. The sole question, therefore, which presents itself for our solution is, whether the contract in question was entered into in such a manner and with such forms as to be obligatory on the corporation. When we say that we need not inquire into the validity of the first sale, we in substance overrule that part of the defence, which sets up a want of consideration for the new contract; because, whether valid and binding, or not, it is certain that the first sale formed the subject of controversy, and the contract now in question may be regarded as of the nature of a transaction between the parties, by which litigation was avoided.

The question then is, whether there is evidence before us to show that the corporation ever gave its assent to this contract, so as to bind it and every person who composes it, so far as its interests are concerned.

It may be remarked in the first place, that the agreement in question does not purport to have been made by the president and directors of the corporation, in the ordinary range of their official duties, and assuming to represent the corporation by virtue of the powers confided to them by the charter. On the contrary, it appears to have emanated from the stockholders themselves. At a meeting of the stockholders, at which a majority does not appear to have been present, either in number of persons or amount of stock, it was resolved, that the president and directors be authorised and instructed to cause the property of the company to be sold by the sheriff, under Mr. Millaudon's mortgage, agreeably to the arrangements made by the committee at the City Bank, and that the proceeds be appropriated to pay the debts of the company, and that the arrangement made by the committee with the purchasers of the property, at the sales on the 9th and 12th of December, be confirmed. At the same meeting, it was resolved, that the stockholders who are not represented at this meeting, be called upon to give their assent or dissent to the foregoing resolution, and that a committee of two be appointed for that purpose.

It appears to us quite obvious, that the doings of this meeting, by themselves, did not render the arrangement proposed by the committee, obligatory on the corporation; because, a majority was not present, even supposing the meeting to have been preceded by proper notices to the corporators to attend.

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At the next meeting, at which it appears from the minutes there was not a majority present, the committee reported that they had called upon a large majority of the stockholders who had signed in the affirmative; that all the persons who had voted in the negative, except Messrs. Lawson and Rice, had requested their names to be placed on the affirmative list, and that a number of stockholders whom the committee had not been able to see, had expressed a wish to sign in favor of the resolutions. Nothing more was done at this meeting than to receive the report of the committee, who furnished a list of those who had signed in the affirmative, and of those who had refused their assent, and the adoption of the report by a majority of the stockholders present. These proceedings form the basis of the subsequent transactions, and the inquiry is, whether they furnish evidence of the assent of the corporation to the contract alleged by the plaintiffs.

Corporations are intellectual beings, distinct from the persons who compose them, and are creatures of the law. They can act only according to their organization, in the form or manner pointed out by their charters and the laws of the land.

Corporations are creatures of the law, or as the code expresses it, intellectual beings, different and distinct from all the persons who compose them. They can act only according to their organization, and in the form pointed out by their charters, or the laws of the land. The estates and rights of a corporation (says the code, article 427) belong so completely to the body, that none of the individuals who compose it can dispose of any part of them. A subsequent article (435) declares that in corporations, the act of the majority is considered as the act of the whole.

The estates and rights of a corporation belong to the whole body, and none of the individuals who compose it, can dispose of any part of them. The act of the majority of the corporators legally expressed, is the act of the whole, and no contract is binding on the corporation which is not binding on every member of it.

We assume it as an undoubted corollary, from these principles, that no contract can be binding on a corporation which is not binding on every member of it, on the ground that the assent of the corporation must be given in such a way as to bind the whole. Where the code speaks of the

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corporators taken separately, and not in full meeting, is not regarded as the will of the corporation itself.

So, where the assent of a majority of stockholders of a building company was expressed, in relation to a certain transaction concerning the corporation, not in a meeting of stockholders, but by each one separately and at different times, and evidenced not by the minutes of the corporate proceedings, but by a separate paper in the possession of a committee: *Held*, that the proceeding was null and void, as containing no legal evidence of the consent of the corporation, either according to its charter or the general principles of law.

act of the majority being the act of the whole, it must be understood to mean, when applied to such a corporation as this, the will of the majority legally expressed; and if any meaning is to be given to the general principle first declared, that the corporation is distinct from all the persons composing it, it must follow that the will of a majority of the corporators, taken separately, is not to be regarded as the will of the corporation itself. We know of only two ways in which such a corporation as the one now under consideration can act, to wit: either through its president and directors, or at a meeting of the stockholders duly convoked. The act by which the defendants were incorporated does little more than give the corporation a name, and a legal capacity. It provides for the appointment of directors, but is silent as to the manner in which the corporators are to be convoked, and how they are to vote, whether *per capita* or according to the amount of shares held by each. In these respects their proceedings and the validity of their acts, must be judged of according to the principles of law, applicable to corporations in general. If the two minority meetings be laid out of view as void, the whole rests upon the assent expressed by a majority of the stockholders not in a meeting of stockholders, but by each one separately and at different times, and evidenced, not by the minutes of their corporate proceedings, but by a separate paper in the possession of a committee. We cannot see in this any legal evidence of the consent of the corporation, either according to its charter or the general principles of law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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The affidavit of the defendant, annexed to his answer, that his signature to the notes sued on is forged and counterfeited, will not be permitted to go to the jury as evidence, when not made the basis of some preliminary or interlocutory proceeding.

The different modes of proof of hand writing or signatures, pointed out by the Code of Practice, are concurrent, and the court is not required to appoint experts for this purpose, unless moved to do so by the party.

A confession drawn from an unhappy parent who is sued, by a letter threatening to prosecute his son for forging his signature to certain notes sold and delivered to the plaintiff, will not bind him.

The provisions of the Code of Practice, in articles 518, 522, 526, 527, and others, requiring certain forms to be pursued in the trial of a cause, are directory, and a non-compliance with them, when not required at the time by the party complaining, does not import pain of nullity.

The party may require the observance of all the forms, as far as practicable, which are directed in the trial of a cause; but if when present, he does not require a rigid compliance with them, and they are substantially complied with, it is not assignable as error, nor sufficient ground for a new trial.

This is an action brought against the defendant, Antoine Foucher, senior, as the drawer of a promissory note, and endorser on three others, amounting to the sum of nine thousand five hundred and sixty-two dollars, which his son, Antoine Foucher, junior, negotiated and sold to the City Bank of New-Orleans. The bank sues as holder of the notes in question, and alleges that on or about the 2d day of May, 1834, the said Antoine Foucher, senior, before any of said notes became due and payable, did voluntarily and freely assure the City Bank, that the signatures of his name on the several notes sued on, were in his own proper hand writing, by reason of which he became indebted in the said

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sum of nine thousand five hundred and sixty-two dollars, including costs of protest, and for which sum and interest the plaintiffs pray judgment.

The defendant pleaded a general denial, and averred that his signature or name written on the notes in suit, is forged and counterfeited. He annexed his affidavit, in which the averments in his answer are set forth and sworn to.

Upon these issues and pleadings the parties went to trial. On motion of the plaintiff upon a rule taken, the court ordered the affidavit annexed to the answer of the defendant, declaring his signature to the notes was a forgery, to be stricken out.

Joseph Guillot, witness for plaintiff, says, "that on Friday, the 2d day of May, 1834, he was requested by the cashier of the City Bank to wait on the defendant, in order to ascertain if the signatures of his name to the notes sued on, were genuine or not. On presenting the notes, the defendant at first seemed a little astonished at the step taken by the bank, but after examining the signatures, he said the notes were good. He observed there was a little difference in one of the signatures being that on the note drawn by him, which arose, he said, from his having made use of a pen with a broad point. He offered to show witness a signature exactly similar, to a note which he had taken up in bank. Witness observed he was satisfied with the acknowledgment of his signature, and that he did not wish to see the note. Defendant further observed, that his son, A. Foucher, jr., was to dine with him that afternoon, (this being at twelve o'clock,) and he would get him to give him a list of all the endorsements he (defendant) had given his son."

In answer to a question by a juror, witness says, "that there were some rumours in circulation at the time, that A. Foucher, jr. had counterfeited his father's signature, but he had not left the city; that the father stated that he would call at the bank the next day, to make some *arrangements relative* to this business."

The cashier of the bank deposed, that the notes in question were discounted in the bank, and that he was well acquainted

with the signatures of the parties, and thought them genuine, or he would have mentioned the fact to the president of the bank.

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Guillot, re-examined for plaintiff, says, he was sent with the following letter from Mr. Peters, the president of the bank, on the 3d day of May, to the defendant :

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“A. Foucher, Esq.

“Sir: By a resolution of the board of directors of this bank, adopted this morning, I am instructed to institute a criminal prosecution against your son, A. Foucher, jr., for having counterfeited your name and others, by which means he has obtained nine thousand two hundred and fifty dollars from this bank.

“I therefore deem it proper to inform you, that unless the amount be paid or secured by one o'clock this day, I shall be compelled to perform the unpleasant duty required of me by the resolution of the board. Yours, &c.”

Witness says, “when he presented and translated the letter to the defendant, he appeared very much affected; made no answer to the demand contained in it, but only said he was very unfortunate. Witness then asked him if he had not admitted on the day previous, that his signatures to the notes sued on, were genuine, and asked him if he was still of the same opinion, to which he answered that he was; that it was after witness read the letter to the defendant, that he put his initials to the notes. Witness told the defendant that it was for his (witness's) own satisfaction, that he wished defendant to put his initials to the notes.”

Several witnesses were introduced on the part of the defendant, who declared they had had frequent transactions with him; and on being shown the signatures of his name on the notes sued on, declared them all to be forgeries and counterfeits.

Upon this evidence the cause was submitted a second time to a jury, who returned a verdict for the plaintiff.

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The defendant moved the court for a new trial, on the following grounds :

1st. The verdict is contrary to law and the evidence in the case.

2d. The forms prescribed by the Code of Practice, articles 518, 522, 526, 527, and others, were not complied with.

The attorney for the defendant annexed his affidavit, in which he declares, that when the jury returned into the court room, they were not called over nor counted ; the verdict were not written by the foreman, but partly by the clerk of the court ; after the verdict was read by the clerk, the jury was not asked if they had agreed on their verdict ; but that it was recorded, on motion of plaintiff's attorney, without any of the above formalities having been fulfilled."

These facts and circumstances were substantially proved as sworn to ; but the court overruled the motion for a new trial. Judgment was rendered in conformity to the verdict, from which the defendant appealed.

Eustis and *De Armas*, for the plaintiff, urged the affirmance of the judgment, with costs and damages, as for a frivolous appeal.

Denis, for the defendant, made the following points and assignment of errors :

1. The judge of the District Court erred, in not appointing experts to compare hand writings, and examine the signatures alleged to be forged.

2. The verdict is contrary to law and the evidence : to the evidence, because if the jury meant that the signatures of A. Foucher are genuine, it is positively contradicted by the evidence ; to the law, if they intend to bind the defendant by his acknowledgements of either the 2d or 3d of May.

3. The verdict should have been set aside, because the formalities required have not been complied with, according to law and the several articles of the Code of Practice, cited in the grounds for a new trial. .

Bullard, J., delivered the opinion of the court.

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In this case the plaintiff seeks to recover of the defendant the amount of several promissory notes, drawn by A. Foucher, jun'r., and alleged to have been endorsed by the defendant, which had been negotiated in the City Bank. The defendant in his answer avers, that his signature on said notes is forged and counterfeited, and that he is not liable. There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

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His counsel in the court relies, for the reversal of the judgment, on the following points :

1. That the court erred in ordering the defendant's affidavit to be struck out.

2. In refusing to appoint experts.

3. That the verdict is contrary to law and evidence : to evidence, if they meant that the signatures of A. Foucher are genuine ; to law, if they meant that defendant is bound by his acknowledgment either of the 2d or 3d May.

4. That the verdict should have been set aside because the formalities required by law were not complied with, according to the articles of the Code of Practice cited on the application for a new trial.

I. The defendant annexed to his answers an affidavit that his signatures on the notes in question, were forged and counterfeited. After argument, the court ordered this affidavit to be struck out, and this act of the court is assigned as error. We are of opinion that the court did not err. Parties are sometimes permitted to make use of their own affidavits, in order to bring to the knowledge of the court such facts as are relied on as the basis of some preliminary or interlocutory proceeding. In this case, no interrogatories were addressed to the defendant, the answers to which might be used as evidence on the trial. Without such interrogatories, his statement on oath could not be used, directly or indirectly, to influence the decision of the case upon its merits. As the court could not legally permit the affidavit to go to the jury, it was properly stricken from the record.

The affidavit of the defendant, annexed to his answer, that his signature to the notes sued on is forged and counterfeited, will not be permitted to go to the jury as evidence, when not made the basis of some preliminary or interlocutory proceeding.

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The different modes of proof of hand writing or signatures, pointed out by the Code of Practice, are concurrent, and the court is not required to appoint experts for this purpose, unless moved to do so by the party.

A confession drawn from an unhappy parent, who is sued, by a letter threatening to prosecute his son for forging his signature to certain notes sold and delivered to the plaintiff, will not bind him.

The provisions of the Code of Practice, in articles 518, 522, 526, 527, and others, requiring certain forms to be pursued in the trial of a cause, are directory, and a non-compliance with them, when not required at the time by the party complaining, does not import pain of nullity.

II. It does not appear by the record, that the court refused to appoint experts, or that such appointment was moved for by the appellant's counsel on the trial. The modes of proof provided for by the Civil Code are concurrent, and it is not, in our opinion, assignable as error that the court did not appoint experts without being required to do so.

III. The evidence as to the genuineness of the signatures of the defendant, was submitted to the jury, and two successive juries appear to have concurred in a verdict against them. If the plaintiff had relied on, or given evidence of the admission of the defendant, made on the 3d of May, under the influence of the letters addressed to him on that day by the president of the bank, by order of the board of directors, he should not hesitate to set aside the verdict. A confession drawn from an unhappy father, by such a menace, should have no weight in a court of justice. But the letter was produced by the defendant himself, and the facts relating to this delivery were drawn from one of the plaintiff's witnesses, on his cross-examination. In the petition, the plaintiff set forth an acknowledgment, made the day previously. The admission of the genuineness of the signatures on that occasion, as proved by the witness, is free from all suspicion, and the application appears to have been made to him with proper delicacy, and without the slightest allusion to any supposed forgery. Its effect can only be weakened by supposing that the defendant had been informed, from some other quarter, of the suspicions afloat in relation to his son, and that he made the admission with a view of favoring his escape, of which there is no evidence before us.

IV. A motion was made for a new trial, principally on the ground that the forms required by the Code of Practice, articles 518, 522, 526, 527, and others, were not complied with. The counsel for the defendant, in support of his motion, filed his affidavit setting forth that when the jury returned into the court room, they were not called nor counted. That the verdict was not written by the foreman, but partly by the clerk of the court; that after the verdict was

read by the clerk, the jury were not asked if they had agreed on their verdict, but that it was recorded without any of the above formalities.

EASTERN DIST.
May, 1836.

PARSONS ET AL.
vs.
SUARES.

It appears that the defendant's counsel was present when the verdict was delivered, and recorded after the amount for which the verdict was given had been filled up by the clerk, and that he did not require a strict and literal compliance with the forms directed by these articles of the Code of Practice. We concur with the judge of the district, that these provisions are directory, and do not impart pain of nullity. The party may require the observance of these forms so far as practicable, but if when present he does not require a rigid compliance with them, and they have been substantially complied with, we think it not assignable as error. Article 560 makes the misbehavior of the jury a good ground for a new trial, "as when the jury has been bribed, or has behaved improperly, so that impartial justice has not been done." This provision seems to repel the idea, that the mere non-observance of forms, such as is shown in this case, affords sufficient ground for a new trial.

The party may require the observance of all the forms, as far as practicable, which are directed in the trial of a cause; but if when present, he does not require a rigid compliance with them, and they are substantially complied with, it is not assignable as error, nor sufficient ground for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

~~RECORDED~~

PARSONS ET AL. vs. SUARES.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

9L	412
52	460
9L	412
103	718

Judgment may be taken on confession of the defendant without a trial, for the sum he admits to be in his hands, and is willing to pay; and the rights of the plaintiffs will be reserved as to the remainder of their claim which is disputed.

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May, 1836.

PARSONS ET AL.
vs.
SUARES.

Where two plaintiffs sue, and the defendant admits he has a certain sum in his hands which is due to one of them, judgment on this confession can only be taken in favor of the one to whom the demand is admitted to be due.

The plaintiffs, A. Parsons and Justine Crevillier, sue to recover from the defendant the sum of one thousand five hundred and sixty dollars, being the amount of a draft remitted to him to purchase a tract of land, and which they allege he has retained and failed to comply with their request. They pray for judgment, and require the defendant to answer interrogatories in relation to the sum of money received by him. The defendant answered, and admitted he received the money, but stated he retained a part of it to pay a note he endorsed at the instance of the plaintiff, Crevillier, and for the payment of a debt of hers, and that he had in hands a balance of one thousand one hundred and fifty dollars, for which he prayed she might have judgment without costs. The district judge rendered judgment accordingly, and the defendant appealed.

Benjamin, for the plaintiff.

Roselius, contra.

Martin J., delivered the opinion of the court.

The plaintiffs allege that they sent a draft to the defendant, with directions to apply the proceeds thereof in the purchase of a tract of land. That the defendant received the money but purchased no land, and refuses to return the funds now in his hands.

The defendant admits the receipt of the draft from Crevillier, one of the plaintiffs, but avers that he was unable to purchase the land as requested; and that he has retained a little upwards of four hundred dollars for claims he has had to pay for this plaintiff, and admits a balance of one thousand one hundred and fifty dollars yet in his hands in her favor, for which he prays judgment in her behalf, against himself, without costs, as no amicable demand was made before suit.

Judgment was given according to the prayer of the defendant, reserving to the plaintiffs their rights to the balance of their claim, which was disputed. The defendant has appealed to this court.

The counsel for the appellant assigned as error on the face of the record :

1. That judgment was given *ex parte*, and without the cause being fixed for trial.

2. That the answer does not admit any debt or balance due to the plaintiffs, but only in favor of one of them.

3. That part of a cause cannot be tried at one time, or on one day, and the remainder at another time.

No trial was had and none required for the balance admitted by the defendant, and for which alone judgment was rendered. It would, therefore, have been useless to have set down the cause for trial.

Judgment was erroneously given in favor of both plaintiffs. There had been no trial as yet in the case, and the confession of the defendant was made in favor of but one of the plaintiffs. If any issue be tried there will be but one plaintiff to join in the trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that the plaintiff, Crevillier, recover from the defendant the sum of one thousand one hundred and fifty dollars; reserving to the plaintiffs their rights as to the remainder of the claim, they paying the costs of the appeal.

EASTERN DIST.
May, 1836.

PARSONS ET AL.
VS.

SUARES.

Judgment may be taken on confession of the defendant, without a trial, for the sum he admits to be in his hands, and is willing to pay, and the rights of the plaintiffs will be reserved as to the remainder of their claim, which is disputed.

Where two plaintiffs sue, and the defendant admits he has a certain sum in his hands, which is due to one of them, judgment on this confession can only be taken in favor of the one to whom the demand is admitted to be due.

EASTERN DIST.
May, 1836.

FRERET ET AL.
vs.
MARIGNY.

FRERET ET AL. vs. MARIGNY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the appellants prayed the affirmance of the judgment from which they appealed, and the adverse party not appearing, to dismiss the appeal, the judgment was affirmed at the cost of the party appealing.

The plaintiffs, Freret, Brothers, sued Bernard Marigny for the rescission of a sale of a tract of land or plantation, alleging a defect of title. Marigny cited in his vendors in warranty, and after an investigation of the several titles, the District Court decreed the land to belong to the plaintiffs, free from all claims, &c., but that they pay the costs of suit. They appealed.

J. Slidell, for the plaintiffs and appellants, made the following point in this case :

1. The judgment of the District Court is in conformity with the law and evidence, and should be affirmed.

Martin, J., delivered the opinion of the court.

The plaintiffs in this case have appealed from a judgment, which appears to have accorded to them all that they required or prayed for ; but they complain in this court, that it condemns them to pay costs.

On the other hand, the appellee has filed no answer, and says nothing. The appellants now present the novel spectacle of having abandoned the apparent attempt to be relieved from the payment of costs, and to obtain them from the appellee ; for they have come into this court, and prayed that the judgment they appealed from, be affirmed.

This singular demand on their part, has not been opposed by the adverse party, who have not appeared and prayed for the dismissal of the appeal. We will, therefore, grant the prayer of the party supplicating.

Where the appellants prayed the affirmance of the judgment from which they appealed, and the adverse party not appearing, to dismiss the appeal, the judgment was affirmed at the cost of the party appealing.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed; the appellants paying the costs of the appeal.

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May, 1836.

GUESNO'S HEIRS
VS.
CUCULLU, EX'R.
ETC.

GUESNO'S HEIRS vs. CUCULLU, EXECUTOR, &c.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The heirs have the right at any time to claim and take the seizin and possession of the estate from the testamentary executor, on offering him a sufficient sum to pay the moveable legacies.

Where the executor refused to pay over the funds of the estate to the heirs, on a rule requiring him to do so, but appealed, he was mulcted in five per cent. damages on the amount in his hands for the delay.

In this case the heirs of Madame Guesno, deceased, took a rule on the defendant who was testamentary executor of the deceased, to show cause why he should not deliver over the seizin and possession of the estate to the heirs, and file an account to ascertain the amount coming to them. The executor filed his account, to some parts of which opposition was made.

On the trial of the rule, the judge of probates made it absolute so far as regards the sum of ten thousand four hundred and eighty-six dollars, which remained in his hands, undisputed. The executor appealed.

L. Janin, for the heirs and appellees.

De Armas, for the appellant.

Bullard, J., delivered the opinion of the court.

The appellant being executor of the last will of the widow Guesno, rendered an account of his administration at the

EASTERN DIST.
May, 1836.

GUESNO'S HEIRS
vs.
CUCULLU, EX'R.
ETC.

The heirs have the right at any time, to claim and take the seizin and possession of the estate from the testamentary executor, on offering him a sufficient sum to pay the moveable legacies.

Where the executor refused to pay over the funds of the estate to the heirs, on a rule requiring him to do so, but appealed, he was mulcted in five per cent. damages on the amount in his hands, for the delay.

instance of some of the minor heirs of the testatrix, who demanded seizin of the estate, to which an opposition was filed in relation to some of the items. There appeared to be due to the minors who had made opposition, a sum of about ten thousand dollars, independently of the disputed items of the account. The minor heirs claim a right to receive that amount under article 1664 of the code, which declares that the heir can at any time take the seizin from the testamentary executor, on offering him a sufficient sum to pay the moveable legacies. Accordingly, pending the contest on the disputed items, they took a rule on the executor to show cause, why he should not deliver to the heirs such portions of the estate as he acknowledged to be coming to them, reserving the disputed items; and why a writ of *fieri facias* and possession, or a writ of *distringas* should not issue in case of refusal to comply with the order of the court. This rule after argument was made absolute, and the executor after an ineffectual attempt to obtain a new trial, appealed.

We have looked in vain into the record for any legal ground upon which the defendant alleges any right to retain possession of any portion of the estate, to which he admits the heirs are entitled. Nor has he thought proper to favor us with any argument, either written or oral in support of such pretensions. The article of the code relied on by the appellees would be a dead letter, if its provisions could be frustrated by such proceedings. Believing that the only object in taking this appeal was delay, we feel bound to grant the prayer of the appellee, and to award damages.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with five per cent. damages, on the sum of ten thousand four hundred and eighty dollars and eighty-three cents, and costs of the appeal.

EASTERN DIST.
May, 1836.

ABAT *vs.* BUISSON, CURATOR, &c.

ABAT
vs.
BUISSON,
CURATOR, &c.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

A judgment is the highest evidence of a debt, and the title merges in the judgment ; but proof of its discharge may be made by presumptive or circumstantial evidence, as well as by positive proof.

The defendant, as curator of the vacant estate of François Loiseau, deceased, on the 10th April, 1834, filed an account of the first year's administration, and a tableau of the effects and debts of said estate, and prayed that his appointment be prolonged for another year and that his account be homologated. Joseph Abat made opposition to the tableau, and claimed to be placed thereon as a mortgaged creditor of the deceased, for the amount of a judgment and costs of four hundred and fifty-eight dollars, which he had obtained in May, 1827, and which was duly recorded.

The curator denied that the estate of Loiseau owed the opponent any sum, and that the judgment annexed was rendered on a promissory note which had been paid. He pleads payment, and calls upon the opposing creditor to deliver up the note on which he obtained judgment.

The certificate of the recorder of mortgages showed, that the general mortgage resulting from recording the judgment, had been erased and cancelled, by order of the Court of Probates.

H. R. Denis, Esq., testified, that he obtained this judgment for Abat on a note drawn by Sendos, and endorsed by Loiseau ; that, on referring to the papers lately, he finds his receipt for the note, which is withdrawn. He thinks, from the circumstance of his withdrawing the note, that it must have been settled ; although he has no recollection of the money having passed through his hands, &c.

Other witnesses testified as to the presumption and probability of the note and judgment being paid.

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ABAT
VS.
EUISSON,
CURATOR, ETC.

The probate judge was clearly of opinion, from the circumstantial testimony in the case, and the fact of the note not being produced, that it was paid. Judgment was given for the curator, from which Abat appealed.

D. Seghers, for the appellant.

Pichot, contra.

Bullard, J., delivered the opinion of the court.

The appellee having filed an account of his administration of the estate of one Loiseau, Abat made opposition to its homologation, on the ground that he was an hypothecary creditor of the deceased, by virtue of a judgment rendered in 1827, and duly recorded with the register of mortgages, which had been omitted in the account; and he prays an amendment of the account, and that he be recognized as a creditor for the amount of said judgment.

The curator, in his answer, admitted that such a judgment had been recovered and recorded, but he avers payment in the lifetime of his intestate.

The opposition was overruled and dismissed, and Abat appealed.

A judgment is the highest evidence of a debt, and the title merges in the judgment; but proof of its discharge may be made by presumptive or circumstantial evidence, as well as by positive proof.

The principle contended for by the counsel for the appellant is admitted: that a judgment is the highest evidence of a debt, and that the original title merges in the judgment; but proof of the discharge of such judgment may be made by presumptions as well as by positive evidence. In this case, it appears that the judgment was against Loiseau as endorser of a promissory note; that judgment was also recovered against the drawer. Some time afterwards, the note was withdrawn from the record by the plaintiff's counsel, who, being requested to erase the mortgage or enter satisfaction, answered, that the money had not passed through his hands, and he could not do it. It further appears, that on the 17th July, 1827, a *fiery facias* issued against the drawer; was returned by order of plaintiff's attorney, on the 31st of the same month, and on the 2d August the note was withdrawn,

the costs having been paid on the 29th of July ; and the note is not accounted for. EASTERN DIST.
May, 1836.

This evidence satisfies us as it did the court of the first instance, that the debt had been paid, and the judgment extinguished.

FLEYTAS
vs.
PIGNEGUY.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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el16 184

FLEYTAS vs. PIGNEGUY.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

A solitary instance of ill treatment of the wife by the husband, during a long cohabitation, when the origin of it does not appear, and is not aggravated in its character, will not authorise a judgment of separation from bed and board.

This is an action for separation of bed and board. The plaintiff is the wife of the defendant, and she alleges, her and her husband have been married since the year 1822, and that she has behaved towards him as a good and affectionate wife ; but that his violent and quarrelsome disposition, notwithstanding her endeavors to preserve peace and harmony, makes her unhappy ; and further, that on the 19th May, 1835, her husband struck her, which, added to his other brutal, abusive and outrageous treatment, renders their living together any longer insupportable. She prays for a decree of the court, separating her in bed and board from her said husband.

The defendant admitted his marriage with the plaintiff, but pleaded a general denial to all the other allegations in the petition.

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May, 1836.

FLETTAS
vs
PIGNEGUY.

Upon these pleadings and issue the parties went to trial. Several witnesses were called, whose testimony comes up with the record. The parish judge was of opinion, on hearing all the evidence, that the defendant had so ill treated the plaintiff, as to render her living with him, any longer, insupportable, and thereupon decreed a separation from bed and board, leaving their property and effects to be regulated by a future arrangement or adjudication. The defendant appealed.

Morphy and Grailhe, for the plaintiff.

D. Seghers, contra.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment of separation from bed and board.

The record presents but one solitary instance of ill treatment. It appears that the parties have been married for a number of years, and have several children. A witness has deposed that she has resided in the house of Mr. and Mrs. Pigneguy, for two years, and that some time in May, 1835, during the evening, she went into Mrs. Pigneguy's room, and found her sitting on the floor, with her head resting on her hands, and declaring one of her eyes was out; on examination, the witness perceived a redness or rather bruise over one of the eyes, and also a redness or contusion of the arms, near the elbow and shoulders, indicating a strong pressure of that limb, and thought she perceived the mark of a nail. Shortly after, the plaintiff, in a paroxysm of rage, kicked at the door of the defendant's (husband's) room, with such violence that she burst it open.

Another witness on the part of the plaintiff, (wife,) in relating an account of this domestic broil, states that the defendant remarked he had received a great provocation from his wife. His conduct, however, must be viewed with a considerable degree of aggravation, from the circumstance of the wife being in an advanced state of pregnancy.

It appears from the testimony, she miscarried a short time afterwards; but her physician does not attribute this misfortune to the mal-treatment of her husband. It was occasioned, according to his account, by her over-excitement, violent exertions, and nervous sensibility.

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FLETTAS
vs.
PIGNESUY.

Whatever may be the protection which married women may be entitled to claim from courts of justice, when ill treated by their husbands, we cannot concur with our learned brother, judge of the parish court, that this case presents proper and sufficient causes and grounds, to decree a separation from bed and board.

The testimony shows and proves the defendant in this case to be of a quiet, pacific temper and disposition. He contends, on his part, that his wife (the plaintiff) is of a very different temperament. To rebut her assertions and allegations in the petition, which are denied by his plea of the general issue, he offered a witness to prove that she was possessed of a violent and choleric temper and disposition. Her counsel opposed the introduction of this testimony, which opposition was sustained by the court.

We have no means of ascertaining the origin of this domestic broil. If the presumption in favor of the weak against the strong, operates favorably to the wife as against her husband, the account given of the defendant, in the evidence offered by the plaintiff, balances it. Her subsequent conduct creates some suspicion, that she provoked the defendant to the quarrel. Husbands are men and not angels.

A solitary instance of ill treatment during a long cohabitation, when the origin of it does not appear, and when it is not attended with circumstances which are much aggravated in their character, does not, in our opinion, authorise a judgment of separation from bed and board.

A solitary instance of ill treatment of the wife by the husband, during a long cohabitation, when the origin of it does not appear, and is not aggravated in its character, will not authorise a judgment of separation from bed and board.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and that there be judgment for the defendant, with costs.

EASTERN DIST.
May, 1836.

WINN
vs.
TWOGOOD.

WINN vs. TWOGOOD.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a redhibitory action by the buyer against the seller of a slave, to rescind the sale and restore the price : *Held*, that when the act of sale imports a warranty against redhibitory vices, although it further appears, the seller purchased the slave as a notorious runaway, the reference in the act of conveyance to the plaintiff, without a full disclosure of this defect, does not modify the warranty of the last seller.

Objections to interrogatories that they contain leading questions, when the depositions or answers of the witnesses are to be taken on commission, must be made before the commission is forwarded to be executed.

Where the certificate or caption of the magistrate to depositions is brief, and not full and explicit, yet if it appear in substance that the witnesses appeared before him, swore to and subscribed their answers, &c., it will suffice.

This is a redhibitory action to annul the sale of a slave, and recover back the price. The plaintiff alleges he purchased a slave from the defendant for the sum of seven hundred dollars, with a general warranty against all diseases, vices and redhibitory defects of every kind. He further alleges that the said slave was a notorious runaway at the time of the sale which was carefully concealed from him by the seller ; and that he has since absconded, and has not been found, although diligent search has been made. He prays that the sale be cancelled and annulled, and that he recover back the price which he gave at the sale. The defendant pleaded a general denial.

The plaintiff read the act of sale from his vendor, the defendant, in evidence, which recites the sale of "a certain slave named Harry, aged about twenty-seven years, acquired by purchase from R. F. M'Guire, per act passed, &c., and dated the 31st of December, 1832, and warranted free from the vices and maladies prescribed by law."

The act of sale from M'Guire to the defendant was also read by the same party, which recites the previous sale to the defendant's vendor, and stipulates that the slave "is hereby warranted free from the vices and maladies prescribed by law, *save and except that of running away, to which he is subject*, and the purchaser having been duly notified thereof by the said seller, takes said slave subject to said vice, hereby renouncing all recourse against said seller."

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WINN
vs.
TWOGOOD.

The judge charged the jury "that the fact of the defendant in his bill of sale, referring to his title, did not bring home the knowledge of the contents of said act of sale to the purchaser." This part of the charge was excepted to by the defendant's counsel.

The defendant's counsel excepted to the reading of the depositions of several of plaintiff's witnesses, on the ground that the interrogatories put by the plaintiff were leading questions. The court admitted them and remarked "that had the objection been made at the time they were served, the counsel on the other side might have changed them."

The reading of another of the plaintiff's depositions was objected to, on the ground that the formalities required by law in executing the commission, had not been complied with; "no *procès verbal* having been made, nor is there any seal of the judge to the declarations of the witnesses, nor in closing the proceedings." The defendant's counsel took his bill of exceptions.

Upon the evidence produced in the case, the district judge gave judgment annulling the sale, and for the return of the price, with costs of suit. The defendant appealed.

M'Henry, for the plaintiff.

1. The verdict of the jury was correct, and the judgment of the court below cannot be disturbed; the proof is by an authentic notarial act, which establishes the vice of character, which gives rise to redhibition of slaves. *Civil Code, article 2505.*

2. The evidence taken altogether, shows that artifice was practised by the appellant on the appellee; for said appel-

EASTERN DIST.
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lant purchased the slave as a runaway, and sold him to the appellee under full guarantee. *Civil Code, article 1841, and 5th, 6th and 7th rules of said article.*

3. The slave was diseased when sold by appellant, so as to render him unfit for the object for which he was purchased, and the judgment for the nullity of sale, and the price of the slave for appellee, must stand.

Sterrett, contra.

In a redhibitory action by the buyer against the seller of a slave, to rescind the sale and restore the price: *Held*, that when the act of sale imports a warranty against redhibitory vices, although it further appears the seller purchased the slave as a notorious runaway, the reference in the act of conveyance to the plaintiff, without a full disclosure of this defect, does not modify the warranty of the last seller.

Objections to interrogatories, that they contain leading questions, when the depositions or answers of the witnesses are to be taken on commission, must be made before the commission is forwarded to be executed.

Where the certificate or caption of the magistrate to depositions is brief, and not full and

Bullard, J., delivered the opinion of the court.

The plaintiff sues his vendor to cancel the sale, and recover back the price of a slave, on the ground that said slave was an habitual runaway and thief. The case was tried by jury, on the plea of the general issue, and there being a verdict and judgment against the defendant, he appealed.

The act of sale, by which the plaintiff acquired the slave in question, imports a warranty against redhibitory vices and defects, and the habit of running away is established by the evidence. It further appears, that the defendant himself had purchased the same slave as a notorious runaway. In the conveyance to the plaintiff, the act of sale by which the defendant had acquired him, is referred to; but, in our opinion, such general reference without a full disclosure of the defect, does not modify the warranty of the seller. The charge of the court on this point, was in our opinion correct, and the bill of exceptions taken to it, cannot avail the appellant.

There is another bill of exceptions in the record, relative to the admissibility of certain depositions taken on commission, which were objected to on the ground that the questions put to the witnesses were leading questions. We agree with the judge, that the objection to the form of the interrogatories ought to have been made before the commission was forwarded to be executed.

A further objection was made to the introduction of the same depositions, on the ground that no *procès verbal* was made, nor any seal of the judge to the declarations of the

witnesses, nor in closing the proceedings. The certificate of the justice of the peace is very short; but it appears in substance, that the witnesses appeared before him, and swore to and subscribed their answers to the interrogatories and cross-interrogatories annexed to the commission. The copy before us has an L. S. after the name of the justice of the peace; but whether there was a seal we cannot decide, because the fact does not appear by the bill of exceptions.

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vs.
TOURNE
AND BECKWITH.
explicit, yet if it appears in substance, that the witnesses appeared before him, swore to and subscribed their answers, &c., it will suffice.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

SAUNE vs. TOURNE & BECKWITH.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

In a case turning on mere questions of fact, where there were numerous witnesses and the evidence somewhat contradictory, but the court below being of opinion the weight of the testimony was in favor of the plaintiff, his judgment was affirmed.

This is an action against the defendants as part owners and agents of the steam-boat Abeona, claiming the sum of two thousand dollars in damages for carelessly and negligently running down and sinking the plaintiff's schooner, with said boat, on the Mississippi river.

The defendant, in a plea of the general issue, denied every thing alleged in the petition.

The cause was submitted to the parish judge on the evidence, who pronounced the following judgment, which contains all the facts and circumstances material to the case :

"1. That in matters of collision between vessels, it is a well settled principle that an inquiry is to be made, from the

EASTERN DIST.
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SAUNE
vs.
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AND BECKWITH.

facts in evidence, into the means which the respective vessels engaged in the event, possessed of avoiding the collision.

"2. That in the present case, it is in evidence that the schooner belonging to the defendant was drifting down the river, without sufficient wind to fill her sails, and that all she could do was to steer a little by means of two sweeps on board, and a skiff towing her ahead.

"3. That the steam-boat of the defendant having the advantage of a propelling power, her motions could be directed, and her course easily altered.

"4. That the defence set up by the defendants, that the steam-boat was in that part of the river which is the one usually occupied by boats ascending, and that the schooner was not in her proper place, cannot be countenanced by this court, for the river Mississippi being a public highway, no custom, even better established than the one relied upon, can restrain the use thereof by navigators; but even admitting the fact relied on, and the existence of such a custom or practice, the steam-boat was nevertheless bound to use every exertion to avoid the schooner.

"5. That from the evidence, the court is satisfied that the injury sustained by the schooner Cultivateur, belonging to the plaintiff, was done by the steam-boat Abeona, belonging to the defendants; and that the collision might have been avoided, had those in charge of the steam-boat Abeona used all the means in their power to prevent it, and that it was not in the power of the plaintiff's schooner to avoid it.

"6. That it is in evidence, that the repairs necessary to put the schooner Cultivateur in the same situation that she was in before she was sunk by the steam-boat Abeona, were worth *one thousand dollars*; that the plaintiff had to pay *sixty dollars* for a lighter to raise her, and *twenty dollars* to tow her from the English Turn to the city; that in consequence of the sinking of his vessel, the plaintiff lost the freight of eighty-six hogsheads of sugar, at two dollars a hogshead, and of eight bales of cotton, at one dollar a bale, amounting together to *one hundred and eighty dollars*. That he paid eight laborers for eight days' work each, their wages being

worth one dollar and twenty-five cents per day, making *eighty dollars*; that he paid *thirty dollars* for the salvage of his sails; and finally, that the loss of his time during three months, say from January 1st to April 1st, valued at twenty-five dollars a month, that is *seventy-five dollars*, making together the sum of *fourteen hundred and forty-five dollars*; being the losses and damages suffered by plaintiff.

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"7. That the steam-boat Abeona is admitted to be a vessel carrying merchandise for hire.

"It is, therefore, ordered, adjudged and decreed, that the plaintiff recover from the defendants *in solido* the sum of one thousand four hundred and forty-five dollars, and costs of suit."

Strawbridge, for the plaintiff.

J. Seghers, for the defendants.

Martin, J., delivered the opinion of the court.

This is an action for damages and remuneration for the loss and injury sustained by a little schooner, owned and navigated by the plaintiff, and which was run down and sunk by the steam-boat Abeona, owned in part by the defendants, and running on the river Mississippi. The plaintiff alleges, that it was through the negligence and carelessness of the master of the steam-boat that the accident happened, and the injury was done to his vessel.

The case turns entirely on the facts as detailed in the evidence. As is usual in cases contested like the present, the witnesses are numerous, and the evidence is somewhat contradictory. The parish judge who heard the parties, was of opinion the weight of testimony was decidedly in favor of the plaintiff, and gave judgment accordingly. We are unable to say the court of the first instance erred.

In a case, turning on mere questions of fact, where there were numerous witnesses, and the evidence somewhat contradictory, but the court below being of opinion the weight of the testimony was in favor of the plaintiff, his judgment was affirmed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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ON AN APPLICATION FOR A RE-HEARING.

Where a schooner is floating down stream, and unable to use her sails, and a steam boat is running up under full steam, it is incumbent on the latter to show that she made use of the proper means of precaution to avoid a collision, or she will be liable for the damage done by running down the schooner.

Steam-boats meeting vessels in the river, propelled by wind, should observe different rules of precaution than in relation to other steam-boats. In such cases, the obvious means to avoid collision, is an alteration in the course or direction of the steamer.

J. Seghers, for the defendant, applied for a re-hearing in this case.

The opinion pronounced in this case seems to rest exclusively on the rule, that in mere questions of fact the court below is the best judge of the evidence. The appellant has the right however to have the evidence considered and collated by this court, without regard to the opinion of the judge in the first instance. This rule however is not without exceptions. The reason why the inferior judge is deemed better prepared to decide on the evidence, ceases when in cases like this he has not seen the witnesses. In this case the testimony is all taken on commission, and out of the presence of the judge, except a small part of it.

2. The whole of this testimony goes to show that the fault did not lie with the master of the steam-boat. This is clearly shown by the testimony of the defendants, and especially that of two witnesses who were examined in the District Court, in suits there, by the owners of the cargo against the defendants. This testimony consisted of the captain and mate of a vessel the steam-boat had in tow at the time, and is now in evidence in this case.

3. This court will certainly not be prepared to say the district judge erred in deciding differently in the suit by the owners of the cargo against the present defendants, than the parish judge in this case. The district judge heard the witnesses and decided in favor of the defendants. The same evidence is in both cases. The other case will come before this court also, and under the same circumstances. This court must then either violate the rule or apply it in contradiction to their present judgment, that the judge who hears the evidence is the best judge of the facts. It would be somewhat singular to decide one way for the vessel, and another for the cargo. A re-hearing is respectfully prayed for.

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Bullard, J., delivered the opinion of the court.

In this case a re-hearing was allowed, and we have deliberately examined the testimony again, and considered the arguments offered, and proceed to state our reasons for adhering to the judgment first pronounced.

The question presented by the case is, whether the officers of the steam-boat *Abeona* took the proper measures of precaution to avoid the collision. We are satisfied from the evidence that the schooner was not at the time propelled by the wind, and had not the use of her sails, but was floating sideways down stream, making efforts by means of sweeps, and a small skiff ahead, to make the port of New-Orleans. It was, therefore, manifestly impossible for her to change her course so as to avoid a steam-boat approaching her path under a head of steam. We repeat, therefore, that it is incumbent on the defendants to show that the steam-boat did make use of proper means of precaution to avoid running upon the schooner.

Where a schooner is floating down stream, and unable to use her sails, and a steam-boat is running up under full steam, it is incumbent on the latter, to show that she made use of the proper means of precaution, to avoid a collision, or she will be liable for the damage done by running down the schooner.

Steam-boats meeting vessels in the river propelled by wind, should observe different rules of precaution, than in relation to other steam-boats. In such cases, the obvious means to avoid collision, is an alteration in the course or direction of the steamer.

The most obvious means to avoid collision is clearly an alteration of the course or direction of the vessel. In this case it is not pretended that the steam-boat changed her course, so as to pass on either side of the schooner, although the schooner was seen at the distance of a mile ahead. The chief pilot left the helm just before the two vessels met. At

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what inoment the wheels of the steam-boat were stopped is left uncertain, but we are satisfied from the violence of the shock, and the extent of the damage done, that she must still have been under head way.

The foggy weather called for additional vigilance on the part of the steam-boat, which had left port in such kind of weather. The right of steam-boats ascending the river to keep along the left bank, according to a pretended usage, can only apply in relation to vessels of the same kind, descending. It would be no excuse for a steam-boat to run down a vessel propelled by wind, that the latter was too near shore, and in the usual track of steam-boats ascending. *Story on bailments, 386.* Believing as we do from the whole evidence in the case, that with proper vigilance and precaution, on the part of the officers of the Abeona, the collision might have been avoided, and that no fault can be attributed to the captain of the schooner, it is ordered that the judgment first pronounced remain unchanged.

BRUNETTI vs. MAYOR ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
 NEW-ORLEANS.

Licenses granted to persons by the mayor of New-Orleans, in pursuance of certain ordinances, to sell fruit at stands or stalls on the levee, confer personal privileges which cease at the death of the grantee, although the period for which the license is given, has not expired.

This is an action for damages. The plaintiff alleges he is testamentary executor and universal legatee of one Tambourline, who had obtained a license from the corporation of New-Orleans, conferring on him the privilege of vending fruit on the levee and occupying a stand, for the

annual sum of fifty dollars, payable quarterly. That said Tambourline died in the beginning of May, 1834, after occupying the premises a little over four months, and that he, the plaintiff, is entitled to succeed to his privileges for the balance of the year, under said license ; but that the stand has been given to another person, under a new license, to take effect at the end of the unexpired quarter for which the deceased had it. He further alleges, that he claimed from the mayor the privilege of occupying the stand and selling fruit for the whole year, under the license granted to Tambourline, in virtue of his will as executor and universal legatee, and tendered the money at the beginning of the next quarter, but that it was refused, and his claim to the privilege rejected. He prays for a judgment for one thousand dollars in damages, which he alleges he has sustained, against the corporation and the person to whom the new license is granted.

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The corporation, by its counsel, excepted to the petition, that the matters charged therein are not sufficient in law to maintain the action, and in not setting forth the demand for damages with more precision and certainty ; which exception being overruled, the defendants pleaded a general denial.

Upon this issue and the pleadings, the parties went to trial before court. The parish judge, who presided at the trial, pronounced the following judgment :

“This cause was this day argued before the court, when after duly weighing the evidence adduced, and arguments of counsel, the court considering:

“1. That the plaintiff, as universal legatee of the late Tambourline, had a right to the stand occupied by the said deceased.

“2. That the city ordinance giving to the mayor the right of removing said stands, and assigning other places for them, must be understood as giving that right to the mayor for public purposes only, and not to put another person in a place already occupied.

“3. That it does not appear from the testimony that another stand was assigned to plaintiff, in lieu of the one

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May, 1836. aforesaid ordinance.

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“4. That the plaintiff, in this case, did not apply for any thing else but the continuation of the license owned by the late Tambourline.

“5. That the loss occasioned to plaintiff is shown to be of fifty dollars per month, and that the plaintiff has been deprived for seven months of the privilege to which he was entitled to.

“It is, therefore, ordered, adjudged and decreed, that judgment be entered in favor of the plaintiff against the defendants for the sum of three hundred and fifty dollars, with costs of suit.”

The defendants appealed.

Roselius, for the plaintiff.

1. This is an action against the corporation of New-Orleans, claiming damages for having illegally deprived the plaintiff of the benefits of a stall on the levee for the sale of fruit, under a license purchased by his testator for one year.

2. It is contended by the defendants, that the right conferred by the license is strictly personal, and not heritable or transmissible. The general rule is, that all rights are heritable, but there are some exceptions; this case is, however, not one of them. At all events, if this case is excepted from the general rules, it lies on the defendants to show it.

3. The evidence clearly establishes the amount of damages awarded, so that the judgment should stand.

Eustis, for the defendants, contended, that the licenses granted to these fruit sellers and others are merely personal and not heritable; and that there should be judgment for the defendants.

Martin, J., delivered the opinion of the court.

This was an action to render the corporation of New-Orleans responsible in damages for refusing to the plaintiff the privilege of a license to sell fruit at a stand on the levee,

which had been granted to a person now deceased, to whose rights the plaintiff claims to have succeeded by inheritance. He had a judgment for damages, which the defendants seek to have reversed in this court.

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It appears that the mayor is authorised and required annually to grant licenses, which authorise the grantee to sell fruit on a spot to be designated, and susceptible of being changed by an officer of the city police.

An annual sum is paid for these licenses, payable quarterly in advance. The plaintiff was allowed after the death of the incumbent to sell fruit until the end of the quarter, for which the last payment had been made by the deceased grantee.

The counsel for the defendants contends, that these licenses are personal to the grantee, and therefore not transmissible by inheritance.

The plaintiff's counsel, on the other hand, urges that they are evidence of a lease for the term for which they are granted, of the spot of ground occupied as the stand for the sale of fruit. This is the only question which the case presents.

Licenses granted to persons by the mayor of New-Orleans, in pursuance of certain ordinances, to sell fruit at stands or stalls on the levee, confer personal privileges which cease at the death of the grantee, although the period for which the license is given has not expired.

The necessity of applying to the chief magistrate of the city for such licenses, offers a presumption that some discretion is to be exercised as regards the person applying for them; and in this respect they differ from a pedler's license, which is obtained from the treasurer of the state by any person paying the tax.

The obligation imposed by the ordinance on the grantees, to have their licenses ready at all times to be exhibited to the police officers, appears in some degree calculated, besides being a means to enforce payment for the use of the privilege under the license, to prevent any other person, not apparently the grantee, from being employed in selling fruit, except as agent or servant of the grantee, who is responsible for them. If these licenses may be had as matter of right, on mere application, and the mayor is without the exercise of any discretion, then the plaintiff cannot complain, if he was required to apply for a license in his own name.

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HUNT ET AL.**vs.****SUARES.**

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and that there be judgment for the defendants, with costs in both courts.

HUNT ET AL. vs. SUARES.**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.**

Where certain articles are sold to the defendant, and the seller agrees to put them up for use, and find the materials to do so, and the articles are destroyed by fire on the premises of the buyer, before they are all put up, they are at his risk, and the loss is his.

This is an action on an account for merchandise sold and delivered by the plaintiffs to the defendant, between the 20th April and 1st of October, 1835, amounting to the sum of five hundred and sixty-five dollars and seventy-five cents, according to an account annexed.

The defendant pleaded a general denial, and that he made a contract with the plaintiffs for putting up certain marble mantle and chimney pieces, the plaintiffs obligating themselves to furnish the necessary materials, and to do the work and labor; that before any of the chimney pieces were put up and finished, the house in which they were to be put up, was destroyed by fire; and that all of said materials destroyed in said house, were at the risk of the plaintiffs, and had never been delivered to this respondent. He prays to be dismissed with his costs.

The plaintiffs proved that most of the articles charged were delivered to the defendant, and that several of the marble mantle pieces were put up in his house, and that one of them was not quite finished when the premises were

destroyed by fire. There were sixty-four dollars worth of articles charged up to the 25th of July, which were not proved. It was further proved that payment was demanded, and that the defendant offered to pay for the articles which he ordered, but refused to pay for the others. There was no evidence of any contract. No testimony was introduced by the defendant.

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The district judge was of opinion, the plaintiffs made out their case, and rendered judgment accordingly. The defendant appealed.

L. C. Duncan, for the plaintiffs.

Roselius, contra.

Bullard, J., delivered the opinion of the court.

The plaintiffs sue to recover the price of various articles, as detailed in their account, which they allege were sold and delivered to the defendant, the principal articles consisting of marble mantle pieces and hearths.

The answer contains a general denial, and the defendant further avers, that he made a contract with the plaintiffs, for the building and putting up of certain marble mantle and chimney pieces, the plaintiffs obligating themselves to furnish the materials and the work and labor; that before any of the mantle pieces had been put up, the house was destroyed by fire, and that if any of the materials were in the house at the time, they were at the risk of the plaintiffs.

The delivery of most of the articles charged, is proved; but there is no positive evidence of such a contract as is set up by the defendant. He seeks to bring the case under article 2729 of the Civil Code, which provides that "when the undertaker furnishes the materials for the work, if the work be destroyed, in whatever manner it may happen, previous to its being delivered to the owner, the loss shall be sustained by the undertaker, unless the proprietor be in default for not receiving it, though duly notified to do so." It appears to us from the evidence, that the principal contract

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Where certain articles are sold to the defendant, and the seller agrees to put them up for use, and find the materials to do so, and the articles are destroyed by fire on the premises of the buyer, before they are all put up, they are at his risk, and the loss is his.

was one of sale of the mantle pieces ready made, and that the agreement to put them up and furnish materials for that purpose, does not take the contract as to the mantle pieces out of the rule which governs that species of contract, and that as soon as they were delivered, they were at the risk of the purchaser, unless a special agreement to the contrary be shown. There is nothing in the record to show that the plaintiffs understood the contract at the time, as it is now interpreted by the defendant, and the cost of putting up is trifling, compared with the cost of the article.

But there is no proof of the delivery of those articles charged previously to the 25th of July, and in this respect the judgment must be reformed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled, and proceeding to render such judgment as in our opinion ought to have been given below, it is further considered, that the plaintiffs recover of the defendant the sum of five hundred and one dollars and seventy-five cents, with costs of the District Court; those of the appeal to be borne by the plaintiffs and appellees.

PARMELE ET AL vs. M'LAUGHLIN ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where goods were purchased and directed to be sent to the buyer, at a distant place, consigned to a certain commercial house, they paying freight: *Held*, that before delivery, either to the buyer or consignees, the sale was not complete, especially as the buyer had not complied with its terms on his part.

A fraudulent purchaser who obtains property by fraudulent representation, acquires only a naked possession, which gives no right to any of his creditors to attach in his hands.

A purchaser of goods, obtained by the seller through fraudulent representations, who buys with full notice of such fraud, acquires no right or property in them; they are liable to the claim of the true owner in his hands.

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PARMELE ET AL.
VS.
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ET AL.

This is an action to recover from M'Laughlin, the purchaser, and Patton, his transferee of an invoice of goods, the sum of two thousand and thirty-nine dollars and fifty cents, the amount for which they were sold by the plaintiffs to M'Laughlin.

The pleadings, facts and evidence of the case are stated in full in the opinion of judge Bullard.

The case was tried against Patton, who was arrested in New-Orleans and held to bail. M'Laughlin never made his appearance, and an attorney was appointed to represent him, as an absent defendant.

The district judge was of opinion from the evidence, that M'Laughlin was a fraudulent and swindling purchaser who left the city before the goods were delivered, or the contract completed; that but for Patton, the plaintiffs would have taken their goods back, but he held conversations with them and lulled them into security. He was, therefore, an actor in the fraud before the purchase was complete, and when the sellers might have protected themselves.

Judgment was rendered against the defendants *in solido*, for the sum claimed. The defendant, Patton, appealed.

Strawbridge, for the plaintiffs contended, that when any thing remained to be done, as between seller and buyer, the contract was not complete, and no right of property attached; and that in this case no right of property vested in M'Laughlin, which he could transfer to Patton. 2 *Kent's Commentaries*, 390, 391, 392.

J. Porter, for the appellant.

1. There was no fraud committed on the plaintiffs by M'Laughlin, and even if there was, Patton was not a party to it.

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2. It is not alleged that any fraud was committed by Patton, but merely that he was acquainted with the fraud committed by M'Laughlin; and supposing this to be so, it does not entitle the plaintiffs to recover from Patton.

3. A false representation, '*gratis dictum*, affords no ground of action. 2 *Kent's Commentaries*, 486. 12 *East*, 632.

4. The whole conduct of Patton resolves itself at most into *injuria absque damnum*.

5. The loss sustained by the plaintiffs, was the consequence of their own imprudence, and breach of confidence on the part of M'Laughlin.

6. The sale from plaintiffs to M'Laughlin was complete between the plaintiffs and defendant, though payment was not made. *Louisiana Code*, 2431.

7. M'Laughlin had a right to sell of course, to transfer to a creditor. The legal title was vested in him. *Civil Code*, 2431. 2 *Kent's Commentaries*, 492.

8. The re-sale may be prevented, but not set aside. 4 *Martin, N. S.*, 475.

9. Goods cannot be stopped *in transitu* when the bill of sale has been assigned by consignee, even though assignee knew they had not been paid for. 9 *East*, 506.

Bullard J., delivered the opinion of the court.

The plaintiffs allege that M'Laughlin, one of the defendants, representing himself as a person of good credit, and authorised to draw bills upon one Coffin, of Mississippi, purchased goods from them to the amount of two thousand and thirty-nine dollars and fifty cents, for which he was to pay by a draft on said Coffin, endorsed by one Shields, or on Shields, endorsed by Coffin, at nine months, including three months interest. That, at the request of M'Laughlin they shipped the goods on board the steam-boat *Splendid*, but that M'Laughlin fraudulently and clandestinely left the state without furnishing the draft or paying for the goods, and on the voyage, or at Vicksburg, or some other place on the river, transferred the same to the other defendant, Patton, who had

converted them to his use, well knowing the premises. They ask a judgment for the price of the goods against both the defendants *in solido*.

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The answer contains a general denial, and judgment having been rendered in favor of the plaintiffs, the defendant, Patton, appealed.

The purchase of the goods is shown; and it appears that before they were shipped, Patton arrived here in pursuit of M'Laughlin, as his absconding debtor. His first plan was to attach the goods which he found on the levee, but he was advised not to adopt that course, as perhaps they had not been paid for. He then called on the plaintiffs and ascertained the terms upon which they had sold, at the same time representing M'Laughlin as a smart, capable man, and that he, Patton, had an idea of advancing him some money and sharing in the profits of the purchase.

This conversation appears to have occurred after the goods were put on board the *Splendid*. M'Laughlin disappeared without making the promised arrangement for the payment of the goods, or even getting the bill of parcels from the sellers; but Patton, instead of levying an attachment, took passage on the same boat with the goods. In the course of her voyage to Vicksburg, M'Laughlin came on board, and then the packages were all transferred to Patton in payment of an old debt.

The receipt, or informal bill of lading, given by the master of the steam-boat, is for three boxes merchandise from Parmele & Baker, marked J. T. M'Laughlin, Jackson, Mississippi, to be delivered at Vicksburg, Lyons & Gilmore paying freight for the same. This paper never appears to have been delivered to M'Laughlin, nor does it furnish any other evidence of property in him than his name marked on the boxes. The only consignees mentioned are Lyons & Gilmore. The goods were to be delivered, they paying the freight. But if we construe the receipt to mean that the boxes were to be delivered to M'Laughlin, still it would appear that no delivery had been previously made, and without such delivery the sale was not complete. It appears, however, at the same time, that the goods had been shipped

Where goods were purchased and directed to be sent to the buyer, at a distant place, consigned to a certain commercial house, they paying freight: Held, that before delivery, either to the buyer or consignees, the sale was not complete, especially, as the buyer had not complied with its terms on his part.

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at the request of M'Laughlin. This it is contended was a delivery, the goods having been sent to the place designated by the purchaser. But this delivery on board must be taken in connexion with the receipt or bill of lading, and with the previous circumstances of the contract, and the obligation of the buyer to furnish a draft according to agreement. Without such compliance with the conditions of the contract, such a delivery would be considered as conditional. 2 Kent, 391.

However doubtful the case might be under these circumstances, in relation to a *bonâ fide* purchaser from M'Laughlin after the shipment of the goods, yet it is manifest that Patton was minutely informed of all the previous circumstances attending the purchase, and the shipment. He knew that M'Laughlin had disappeared without complying with his promise, and not satisfied with concealing from the plaintiffs his knowledge of M'Laughlin's character, his representations were calculated to throw them off their guard, and to induce them to part with the goods. We cannot doubt that M'Laughlin obtained the goods fraudulently, however honest his original intention may have been. In the case of Gasquet & Co. vs. Johnson, this court held that a fraudulent purchaser who obtains property by fraudulent representation acquires only a naked possession, which gives no right to any of his creditors to attach in his hands. 2 Louisiana Reports, 514.

The case of D'Wolf in 2 Mason's Reports, is a still stronger case.

According to the authority of these cases, Patton could have gained nothing, even by an attachment of the goods in question; much less can he as a purchaser with full notice, if not a participation in the fraud.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

A fraudulent purchaser, who obtains property by fraudulent representation, acquires only a naked possession, which gives no right to any of his creditors to attach in his hands.

A purchaser of goods, obtained by the seller through fraudulent representations, who buys with full notice of such fraud, acquires no right or property in them; they are liable to the claim of the true owner, in his hands.

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MILLAUDON ET AL. vs. PERCY ET AL.

MILLAUDON
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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where certain moneys, arising on the balance of a judgment, are ordered to be paid into court, and before it is deposited, execution issues for the whole amount of the judgment, an injunction will be sustained for so much of said moneys as are shown to have been paid, and for such further sum as the defendants in the judgment will be entitled to receive in their own right, and dissolved for the remainder.

This is an injunction suit. The case grows out of the manner of executing a judgment, which Percy and others, stockholders of the Planters' Bank of New-Orleans, obtained against the present plaintiffs in injunction, as former directors of said bank. This judgment decrees a certain amount of money to be paid over to Percy, &c., and the balance to be paid into court, to be divided among the stockholders of the bank. A tableau of the respective claims of the stockholders was made out, on which the present plaintiffs in injunction were placed, as claimants and stockholders.

When the judgment was first rendered in the case of Percy and others vs. Millaudon and others, the parties entered into the following agreement :

"It is agreed, that as regards the sums to be paid into court by the defendants, Millaudon and J. Abat, for distribution among the stockholders, after payment of the debts of the Planters' Bank, the amount *due to them* as creditors and as stockholders shall be deducted out of it, and the balance shall be paid over to me, (A. Hennen,) as attorney for the other creditors, so soon as a statement and tableau of division can be made out ; but in the mean time, no part thereof is to be paid by said Millaudon and Abat ; yet they shall pay the balance as above stated, as soon as demanded, as specified above, and in case they should delay or refuse to pay the

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same, they shall pay an interest on the same, at the rate of ten per cent.; and an agreement to this effect is to be signed.

"A. Hennen, attorney for the plaintiffs.

"L. Millaudon, for himself and J. Abat."

Notwithstanding this agreement, execution was issued for the whole amount of the judgment, which Millaudon and Abat had enjoined, alleging and setting up large payments and the foregoing agreement as a defence.

The defendants in injunction admit the payments and credits claimed, but pray that the injunction be dissolved with ten per cent. interest and twenty per cent. damages, &c.

The district judge, on a rule taken, dissolved the injunction without giving any relief, and the plaintiffs therein appealed.

Macready, for the plaintiffs and appellants.

1. The judgment dissolving the injunction is erroneous, because it allows no credit for the sum due to the appellants, as stockholders of the Planters' Bank, and which was expressly stipulated in the agreement entered into by the parties to the first judgment. By that agreement, the amount due to them was to be deducted from the balance of the judgment in the original suit, which was ordered to be paid into court.

2. The injunction should not have been set aside, except for the sum found due, after allowing the appellants the amount paid by them on the original judgment, and the sum also due to them as stockholders, &c.

Hennen, contra.

Martin, J., delivered the opinion of the court.

This case commenced by injunction. The plaintiffs in the injunction are now appellants from a judgment decreeing its dissolution, without extending the relief for which they asked and obtained it in the first instance. The injunction was originally obtained on the 28th of August, 1832, to stay an execution which had issued on the judgment of this court,

pronounced in the case of *Percy et al. vs. Millaudon et al.*, EASTERN DIST.
3 Louisiana Reports, 568. May, 1836.

The injunction was granted on the sworn allegation, that the applicants had paid all the moneys which by the said judgment they were condemned to pay absolutely and unconditionally; that by an agreement entered into with the plaintiffs in that judgment, with regard to the sum which was to be brought into court for distribution among the creditors or stockholders of the bank, the defendants therein were allowed to retain such sum, as would appear to be due to them, as forming a part of the creditors and stockholders of the said Planters' Bank, and as soon as a division and tableau of distribution could be made, they should be required to pay the balance, and not before.

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It appears, a tableau of distribution was accordingly made, by which the rights of these parties, who were the defendants in the original judgment, and now plaintiffs in injunction, were sought to be ascertained. To this tableau of distribution they filed their opposition. Their claims as creditors and stockholders were allowed; but their opposition to certain charges, and particularly to commissions and fees allowed to the attorneys of the opposite party, were overruled. From the judgment of the court, on the tableau, they obtained an appeal, which was dismissed on account of some irregularity at the June term of this court, 1834. *6 Louisiana Reports*, 584.

On the decree of dismissal of the appeal reaching the District Court, the injunction was dissolved, as to the sum already paid by the present appellants.

They do not deny, that the sum they are entitled to retain under the agreement, as creditors and stockholders, is not correctly ascertained in the tableau approved by a judgment of the District Court, unappealed from and now unappealable; but they seek to be relieved from certain charges which that judgment allows.

Where certain moneys arising on the balance of a judgment are ordered to be paid into court, and before it is deposited execution issues for the whole amount of the

As the judgment on the tableau is not now appealed from, the present appellants must be considered as included therein, and concluded by it.

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judgment, an injunction will be sustained for so much of said moneys as are shown to have been paid, and for such further sum as the defendants in the judgment will be entitled to receive in their own right, and dissolved for the remainder.

But the same judgment allows them the sum of five thousand one hundred and six dollars and sixty cents, with interest thereon to the time allowed by the original judgment of this court. The injunction ought, in our opinion, to have been made perpetual as to that sum.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the injunction be made perpetual as to the sum of sixty-four thousand two hundred and fifteen dollars and fifty-four cents, already paid, and also for the further sum of five thousand one hundred and six dollars and sixty cents, allowed by the judgment of the District Court on the tableau, and dissolved as to the residue; the appellees paying costs in both courts.

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ON AN APPLICATION FOR A RE-HEARING.

Where interest is stipulated to be paid on a balance of a sum of money, as soon as it is demanded, and a delay or refusal to pay; and no demand is shown by the party claiming it, the interest will not be allowed.

The defendants in a judgment, who were required to pay a certain sum of money into court, for distribution among the stockholders of a bank, may retain in their hands the amount due them, as a part of the stockholders who are to be paid.

Macready, for the plaintiffs in injunction, prayed for a re-hearing in this case, on the following grounds:

1. The judgment does not give full effect to the agreement between the parties, which states that the defendants in the judgment shall not be required or bound to pay over, either

to the sheriff, or the plaintiffs in the judgment, the amount of stock held by them, and the sums which are due to them as stockholders.

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2. The court in its recent judgment says, these parties shall be permitted to retain, out of the amount of the original judgment against them, the amount of the debts due to them as stockholders of the bank. But it does not give them the right of retaining in their hands what is due to them for their own stock ; so that the agreement is only supported in part.

3. It would be nugatory to compel them to pay over to the sheriff a sum of money, which they would have a right to demand from him the next instant.

They pray that the judgment be so amended as to allow them to retain in their hands the amount coming to them as stockholders of the Planters' Bank, as shown by the tableau of distribution.

Hennen, contra, prayed that the judgment be further amended, requiring the defendants in the original judgment to pay interest on the balance due according to the agreement between the parties.

Martin, J., delivered the opinion of the court.

In this case a re-hearing has been granted, on the application of the plaintiffs in the injunction. They claim to be exempted from the obligation of paying into court the sum which is due to them as stockholders of the Planters' Bank.

This exemption is claimed under an agreement with the plaintiffs in the original judgment against them, and now defendants in injunction, and who do not deny it, but contend that if the judgment be amended, so as to give the benefit of this agreement to these parties, it ought also to be amended, in order to allow them the benefit of another part of the same agreement, and in which they set up a claim for interest.

It appears to the court, that this latter demand, set up by the defendants in this injunction, cannot be allowed, because by the very terms of the agreement, interest was only to run on the balance due, from the time it was demanded, and

Where interest is stipulated to be paid on a balance of a sum of money, as soon as it is demanded, and a delay or refusal to pay ; and no demand is shown by the party claiming it, the interest will not be allowed.

The defendants in a judgment, who were required to pay a certain sum of money into court, for distribution among

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the stockholders
 of a bank, may
 retain in their
 hands the amount
 due them, as a
 part of the stock-
 holders who are
 to be paid.

It is, therefore, ordered, adjudged and decreed, that the judgment heretofore pronounced in this case be amended; and that the plaintiffs be exonerated from the obligation of paying into court the amount due them as stockholders, according to the sums allowed them on the tableau; and that the remaining parts of the said judgment remain undisturbed.

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**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. JOHN
 THE BAPTIST.**

The provision of the Louisiana Code, article 2297, making the parents of minors responsible for the damages done by their minor children while under their care, is found under the head of *quasi* offences, and does not relate to the contracts of minors, &c.

The plaintiff alleges, that in 1833 and 1834 he employed one Lucien Troxler, a minor son then living with his mother, and natural tutrix in the parish of St. John the Baptist, and with his mother's consent, to sell goods on his account as a hawker or pedler; and for this purpose furnished him with a cart and two horses, and a stock of goods amounting to seven thousand six hundred and seventy-two dollars; that in the course of his trading, said Troxler only returned two thousand five hundred and eighteen dollars, leaving a balance due of upwards of five thousand dollars; and that he has embezzled this sum and sold the horses and cart, and appropriated the whole to his own use and squandered it together, so that both him and his mother, who was then

his natural tutrix, have become liable for these sums and damages. That since incurring liability for these claims the mother has died, and that Antoine Haydel has been appointed tutor to the son.

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He prays that the tutor, and also the administrator of Madame Troxler's succession be cited, and that judgment be rendered in his behalf for the amount of his claim.

The defendant pleaded a general denial; and that he was not liable, nor the estate of Madame Troxler, even if the facts stated were true, (which are denied) and that the plaintiff was alone to blame for employing a person of the youth and inexperience of the son, and was the cause of his falling into dissipated habits, &c.

Evidence was produced to show the embezzlement and loss of the plaintiff.

The judge of probates was of opinion no liability attached to the defendant or the succession of Madame Troxler, and gave judgment accordingly. The plaintiff appealed.

J. Seghers, for the plaintiff and appellant, contended that the defendants were liable, under the article 2297 of the Louisiana Code. This position is supported by the most eminent French commentators. See 11 *Toullier*, No. 271, 275, 278. 13 *Duranton*, No. 708, 709, 710, 714, 715, 716.

2. It is objected, that the article of the code, relied on to support the plaintiff's action, is found under the title of *quasi offences*, and does not apply. This objection cannot avail the party. The Court of Cassation, in France, in construing the Napoleon Code, pays no regard to the title or paragraph under which an article may be placed. For instance, it applied to *last wills and testaments*, the article 1157 which is found under the head of *contracts*. 5 *Toullier*, No 430. See also 1 *Martin*, N. S., 79.

Morphy and Grailhe, contra.

1. Minors are not bound by contracts made in the course of trade, unless they be emancipated. *Louisiana Code*, 379, 1775, 1778, 1867 and 2222. 5 *Martin*, N. S., 651. 3 *Ibid.*, 400.

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2. The inexecution of a contract gives a right to damages *ex contractu* and not *ex quasi delicto*. Quasi offences are those by which an injury is done, independent of any agreement. *Louisiana Code*, 2294. 2 *Louisiana Reports*, 429. 3 *Ibid.*, 591. 11 *Toullier*, page 136.

Martin J., delivered the opinion of the court.

In this case the plaintiff sues to recover from the minor, Lucien Troxler, and the succession of his deceased mother and late tutrix, the sum of five thousand one hundred and fifty-three dollars, alleged to have been embezzled by the minor son whilst in the employment of the plaintiff in selling goods as a pedler, with the knowledge of his mother.

The Court of Probates rejected the claim, and the plaintiff appealed.

The provision of the Louisiana Code, article 2297, making the parents of minors responsible for the damages done by their minor children, while under their care, is found under the head of *quasi offences*, and does not relate to the contracts of minors, &c.

The counsel for the appellant relies on a provision in the Louisiana Code, article 2297, which renders the mother (after the death of the father) responsible for the damage occasioned by her minor children, residing with her, &c.

This article is found in the code under the head of *quasi offences*, and it would be absurd to extend its interpretation and application to the contracts of minors.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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WAKEFIELD vs. M'KINNELL.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The surety in a bail bond, may surrender his principal in execution, at any time before the conditions of the bond are made absolute by a judgment against himself.

If the principal in a bail bond dies before judgment is rendered against the surety, so as to put it out of the power of the latter to surrender him in execution, the bail will be discharged.

The counsel for the plaintiff took a rule on the defendant, to show cause within ten days, why judgment should not be rendered against him, as bail for Wm. Wilkins, in the sum of six hundred and forty-six dollars and sixty-six cents, with interest, being the amount of a judgment obtained against the latter, and which remained unpaid.

The defendant in his answer stated, that Wilkins, the principal in the bail bond, had died, long before he was notified that a *ca. sa.* had issued against him; and that if he had had notice in time he could have surrendered him; that the business of said Wilkins, on the river, rendered his absence from the state frequent before his death. He prayed that the rule be discharged.

The evidence showed that writs of *fieri facias* and *ca. sa.* had issued against Wilkins, and returned unsatisfied the third Mondays of May and July, 1835. Wilkins died in Louisville, Kentucky, in September, 1835. This proceeding under the rule, commenced November 10th, 1835.

The district judge decided that bail might be relieved at any time before he is fixed, by complying with the terms of his bond. He is a conditional surety, and as such is entitled to relief by a compliance with the condition, if such a compliance is possible. If the condition become impossible, as by the death of the principal, he should be relieved. There was judgment discharging the rule. The plaintiff appealed.

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Schmidt, for plaintiff and appellant.

1. The bail is liable for the judgment against defendant, under the 219th article of the Code of Practice, it being clearly shown that the condition of the bond was forfeited by the departure from the state of Wilkins.

2. The inferior court erred, therefore, in deciding that the surety was released by the death of the defendant, Wilkins, under the 230th article of the Code of Practice, as will be obvious by referring to the 235th article, which provides that the failure to surrender the person of the debtor, &c., entitles plaintiff to judgment against surety.

3. The judge *a quo*, misled, no doubt, by the maxim that the law never requires impossibilities, forgot that it was inapplicable in a case where the responsibility had already attached, and where the law merely as a favor allowed a surrender, provided it was practicable, after the obligation of the bail became irrevocable.

4. The District Court was also misled by supposing the bail required in Louisiana analogous to bail at common law, as understood in England and in our sister states. This analogy vanishes on the slightest examination, since bail at common law only becomes answerable for the appearance of the debtor. See *Jacobs's Law Dictionary, verbo Bail. Bacon's Abridgment, verbo Bail. Edinburg Encyclopædia, same title.*

5. The nature of bail in Louisiana, is further explained in the Louisiana Code, articles 3033 to 3037, both inclusive, and an attentive examination of our legislation, will show that bail in Louisiana is equivalent to the *judicatum solvi* of the Roman law, whenever a defendant leaves the state; whereas at common law, bail is invariably analogous to the *judicia sisti* of the Romans. *Digest, lib. 2, tit. 8, sec. 15.*

Kennicott, contra.

Mathews, J., delivered the opinion of the court.

This is an appeal from a judgment of the court below, pronounced in relation to a rule taken on the defendant, to show cause why judgment should not be entered against

him as bail of a certain Wm. Wilkins. The judgment was in favor of the defendant, from which the plaintiff appealed.

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It is shown by the facts of the case, that Wilkins, after giving bail, left the state and died at Louisville, Kentucky, in the month of September, 1835. Judgment was obtained against the principal, and two writs of execution were issued and returned before his death, viz: a *feri facias* and a *ca. sa.*; the returns to which show that neither his property or person could be found.

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The counsel for the plaintiff relies principally on an alleged forfeiture of one of the conditions of the bail bond, for a recovery against the bail; and that is, the departure of the defendant in the original suit from the state, without leave of the court.

The conditions prescribed by the Code of Practice to be annexed to a bail bond, and which are to determine the obligations of the parties to it, appear to be two. 1st. That the defendant shall not depart from the state without leave of the court. 2d. That he shall appear when judgment shall have been rendered, &c. The bail is made responsible, as it would appear, by the act of departing from the state without leave, or by the negligence of his principal in not appearing after judgment rendered against him. These conditions are found in articles 219 and 222. It must be confessed that they are calculated to produce confusion in this part of our civil procedure, as the first seems to apply to arrests for debts generally, and the last to arrests for those not yet due. In the present case, neither party has favored us with a copy of the bond; but we presume it contains the condition prescribed by the code, in ordinary cases of suits for debts due, and no other. Although no other be expressed in the bond by which the bail is rendered responsible, and the means pointed out by which he may be discharged; yet there is another clearly implied by the rules in relation to bail, found in the articles 230 and 231; according to which the surety may release himself from all obligations, by surrendering the person of his principal in execution, at any time before they become absolute, by a judgment against him; viewed in this

The surety in a bail bond may surrender his principal in execution, at any time before the conditions of the bond are made absolute by a judgment against himself.

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If the principal in a bail bond dies before judgment is rendered against the surety, so as to put it out of the power of the latter to surrender him in execution, the bail will be discharged.

light the bail authorised by our jurisprudence is very similar to that known to the common law, by the appellation of bail above.

No one can doubt of the complete exoneration of a surety in a bail bond, from all his obligations, by the surrender of his principal, in pursuance of the articles of the Code of Practice last cited; notwithstanding the latter may *ad interim* have been absent from the state. The evidence shows that the death of the defendant in the original suit, put it out of his power thus to exonerate himself; an occurrence which forms a legal excuse for both the principal and his surety, in not complying with the conditions imposed by the contract.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Excesses, cruel treatment and outrages, on the part of the husband towards the wife, form a legal ground for separation from bed and board, when it is of such a nature as to render their living together insupportable; but the court must judge from the proofs and circumstances, not from the opinions of witnesses, whether these grievances are of such a character as to render the life of a reasonable woman intolerable.

A series of studied vexations and provocations on the part of the husband, without resorting to personal violence, might constitute that degree of cruel treatment and outrages, which would form just ground for a separation from bed and board.

But the partial treatment of one of the children by the father, and the child's disobedience towards the mother, supposed to result from the

father's encouragement, will not be deemed sufficient ground for a separation from bed and board.

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No acts of ill treatment occurring after the inception of suit, can be urged as grounds or cause for a judgment of separation.

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A marriage contract entered into in France, where no community of acquests and gains existed by law, and none was stipulated, yet when the parties removed to Louisiana, such a community took place by operation of law, in reference to the property acquired here.

The wife has an action against the heirs of her husband, to recover her share of the property of the community alienated by him in fraud of her rights; but when she claims this right, in addition to a judgment of separation from bed and board from her husband, and fails in the first, she is not entitled, *then*, to any remedy in relation to the property.

This case commenced by the institution of two separate actions. The wife first sued her husband for her half of the community, alleging that he had endeavored to defraud her, by selling his property to his two sons, and by suing his creditors. See the facts of this case, in the suit of *Tourné vs. His Creditors*, reported in 6 *Louisiana Reports*, 459.

Madame Tourné afterwards sued her husband for a separation from bed and board. This case was tried with the former one, on its return from the Supreme Court. The pleadings and facts material to the case, are sufficiently stated in the opinion of the district judge, who tried it in the first instance.

“This is a suit of separation from bed and board, between husband and wife, and also to set aside a sale from the husband to his sons; made, as is alleged, with the intention to defraud the wife of her contingent interest in the community. These causes of action were originally dilated into two suits, which have since been consolidated.

“The *gravamen* of the suit for separation is ‘that since about five years, and since the return of the husband from Europe, in 1828, some causes of which she is ignorant have totally estranged her husband’s affections from her, and have brought on her his inveterate hatred.

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“ ‘That since that time her husband has neglected her in an outrageous manner, has abandoned her, has ill-treated her, and suffered others, especially two of her children, to speak to her in an insulting manner, in her own house, and that by his abuse and insults he has rendered their living together intolerable.’

“These parties lived together, as is admitted on both sides, in harmony, from 1798 to 1828. They came from France about 1815, having left two of their daughters in France, and brought three other children with them; the father went and brought the daughters from France in 1828.

“I am at a loss to determine from the evidence what is the cause of difference between them; on one side it is said to have originated with the youngest daughter, on the other it is alleged to grow out of the mother’s partiality for a daughter married to Auvray; be that as it may, neither from the allegations of the petition, nor from the evidence, can I discover any legal cause for granting a separation from bed and board. Members of the family and neighbors have been examined on both sides, and the result is, that there is some disagreement, the cause of which is not satisfactorily explained, but there is nothing like outrage or positive ill-treatment proved against the husband.

“As to the statement of witnesses, that their living together is intolerable, this general declaration ought to have little weight with the court; the facts are to be proved which make it so, the opinion or notions of the witnesses will not suffice.

“It would lead to the subversion of society, if for every kind of disagreement, married persons were divorced. Estrangement of affections, and the coldness and indifference which grow on change of man, are not good reasons for divorce.

“There is no sufficient cause exhibited in the evidence produced before the court to sustain the plaintiff’s demand for a divorce, and with this part of the demand, falls the second branch of the cause.

“The defendant must pay the costs, as a debt incident to marriage.

“It is, therefore, considered that there be judgment for the defendant Jacques Tourné, and that plaintiff, Jeanne Revière Tourné, return to, and live with her husband.”

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From this judgment the plaintiff appealed.

Deblieux, for the plaintiff and appellant.

D. Seghers, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff sued her husband for a separation from bed and board, on the general allegations, that for some years past, some causes of which she is ignorant, have lately estranged her husband's affections from her, and brought upon her his inveterate hatred; that since that period he has neglected her in an outrageous manner; has abandoned her, ill treated her, and suffered others, particularly two of her children, to speak to her in an insulting manner, in her own house, and that by his abuses and insults he has rendered their living together intolerable.

The defendant in his answer denies these allegations, and avers, that during thirty-five years of cohabitation with his wife, he has always treated her with the regard which their relative situation demanded. He admits that recently he has been obliged to impose some restraints upon the expenses of his wife, in consequence of an infatuated preference on her part for one of the children.

The ^{only} District Court rejected her demand for separation, and she appealed.

The evidence certainly shows that for a period of more than thirty years, these parties lived together in harmony, and brought up a family of five children, most of whom are now established in the world. During that period she showed herself an industrious and frugal wife, and enjoyed the entire confidence of her husband, who, on his departure for France, some years since, to bring over two daughters who had been left there for their education, entrusted to her the management of his affairs. During that long series of

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A series of studied vexations and provocations on the part of the husband, without resorting to personal violence, might constitute that degree of cruel treatment and outrages, which would form just ground for a separation from bed and board.

But the partial treatment of one of the children by the father, and the child's disobedience towards the mother, supposed to result from the father's encouragement, will

years, it is not pretended that her husband ever treated her with unkindness, or left her wants unsupplied. Soon after his return, about five years ago their domestic troubles commenced. The causes of this change are in a great measure wrapped in mystery. It is not pretended that the husband was ever guilty of personal violence towards the plaintiff, nor is it shown that she was in want, much less abandoned by him.

Excesses, cruel treatment and outrages, form a legal ground for separation from bed and board, when such ill treatment is of such a nature as to render the parties living together insupportable. *Louisiana Code*, 138. The tribunal called on to pronounce on the gravity of the offence, or series of acts complained of, must judge according to the proofs of such facts, whether they are of such a character as to render the life of a reasonable woman intolerable, making proper allowances, for the frailty of our nature, the just authority of the husband, and the respect due by him to the mother of his children. We cannot take the opinions of witnesses as to the conclusions we are to draw in these matters. We are bound to decide according to facts. Some witnesses have stated, it is true, that they think the longer cohabitation of the plaintiff with her husband would be intolerable. Many of the facts from which they appear to have drawn this conclusion, are, in our estimation quite trivial. A series of studied vexations and provocations on the part of a husband, without ever resorting to personal violence, might constitute that degree of cruel treatment and outrages which would form a just ground for a separation from bed and board. It is probable that the unkind treatment and disobedience of one of the daughters, was one of the principal causes of the present unhappy controversy. So far as the evidence shows the conduct of the defendant, in relation to that treatment, it may be imputed to the weakness of a father, perhaps with more propriety than to the cruelty of the husband. But we concur with the judge of the District Court, that the plaintiff has not shown enough to entitle her to a separation from bed and board.

It has been urged, that since the inception of this suit, the aggravated ill treatment of the defendant towards his wife, ought to be taken into consideration by us, in deciding on the case. We do not feel authorised to do so. The only question we have to examine, is whether the facts alleged as having occurred before the suit was brought, are sufficient to justify a separation.

Soon after the commencement of this suit for separation, the plaintiff discovered that her husband had sold some valuable property to two of his sons, and about four months afterwards he made a surrender of his property to his creditors. She instituted another suit against her husband and her two sons, alleging that the sale was in fraud of her rights, and praying it might be annulled, alleging at the same time, that her husband had made a fraudulent surrender, and had been appointed syndic of his own creditors. In a supplemental petition, she alleges that according to the marriage contract, which was entered into in France, she was entitled absolutely in her own right, to one-half of the property acquired during the marriage, and that no community of acquets and gains existed between them, according to the laws of Louisiana, but that one-half of the property thus acquired, forms her paraphernal estate.

The marriage contract was entered into in that part of France, which was at that time governed by the written law, and where a community of acquets did not exist, unless by stipulation between the parties. The clause in the contract, on which the plaintiff relies in support of her pretensions, is in these words: "*S'associent les futurs époux en tous les acquêts qu'ils feront pendant le mariage, lesquels chacun fera à sa volonté.*" &c. The only sensible construction we can give to this clause, is that the parties intended to establish between them a community of gains. On their coming to reside in this state, such a community took place by operation of law, in reference to property acquired here, unless expressly excluded by their matrimonial agreement. This is the construction most favorable to the wife. The law gives to the wife an action against the heirs of her

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not be deemed sufficient ground for a separation from bed and board.

No acts of ill treatment occurring after the inception of suit, can be urged as grounds or cause for a judgment of separation.

A marriage contract entered into in France, where no community of acquets and gains existed by law, and none was stipulated, yet when the parties removed to Louisiana, such a community took place by operation of law, in reference to the property acquired here.

The wife has an action against the heirs of her husband, to recover her share of the property of the community, alienated by

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him in fraud of her rights; but when she claims this right, in addition to a judgment of separation from bed and board, from her husband, and fails in the first, she is not entitled, then, to any remedy in relation to the property.

husband, to recover her share of property of the community, alienated by him in fraud of her rights. *Louisiana Code*, 2373. Having failed in her suit for separation from bed and board, she is not entitled at this time, to any remedy in relation to the property in dispute. However suspicious that transaction may appear, especially when coupled with a surrender of the residue of the property to creditors, so soon afterwards, grounded on the allegation of losses sustained by reason of the extravagance of the wife, of which this record furnishes no evidence, yet the wife is without immediate remedy, unless so far as she may be permitted to oppose a tableau of distribution, as a creditor for a small amount, and recognised as such by the proceedings in the case of *Tourné vs. His Creditors*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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CHARDON'S HEIRS vs. BONGUE.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

There is no rule of law requiring the names of the witnesses to a will, to be inserted in the caption, or any particular part of the testament. It is sufficient if they sign.

A mere suspension of the proceedings in making and writing a will by the notary, for two or three hours, in consequence of the weakness of the testator, or his want of decision, or for time to reflect more maturely on the disposition of his property and affairs, when the notary and witnesses do not leave the house, is not a turning aside to other matters, so as to render the will illegal or null.

The notary is prohibited from interrogating the testator, or so to shape his inquiries, while writing his will, as to suggest a particular disposition of his property. A suggestion of the notary, is proscribed as a ground of nullity, by the Louisiana Code.

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This is an action instituted by the heirs and representatives of Joseph Chardon, deceased, residing in France, against the defendant as testamentary executor, to annul and set aside the will of the deceased.

The pleadings and evidence of this case, are so fully set forth in the opinion of the probate judge, that the following extracts are taken as a full statement of the case.

"Joseph Chardon, formerly of the city of New-Orleans, died in the said city on the 7th of July, 1830. A few days previous to his death, to wit: on the 3d of July he executed his testament before Felix De Armas, notary public; by that testament he emancipates all his slaves, bequeathes to one Jenny and to one Eugene, formerly his slaves, a sum of three thousand dollars each, and institutes the defendant, Pierre Isaac Bongue, his universal legatee, and appoints him his testamentary executor.

"The plaintiffs appearing as brothers and nephews, and as such lawful heirs of the said Joseph Chardon, attack the will made by the deceased, as aforesaid, on several grounds and allegations detailed in a petition and supplemental petition, by them presented to this court, and pray that the same be declared null and void, as well as the proceedings had thereupon, and that the said J. Chardon be adjudged to have died intestate, &c.

"The answer is a general denial.

"The best means, I think, of arriving at a decision of the case, is to examine *seriatim* the allegations of the plaintiffs, and to ascertain how far they are supported by the evidence, and by the laws applicable to the case.

"1. The first allegation of the plaintiffs is, that Felix De Armas, the notary public who received the testament, 'has never been requested by the said Chardon, to come near him for the purpose of receiving this pretended will, in which

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besides, no mention is made that he had been requested to do so.'

"The testimony shows, on the contrary, that the deceased was desirous that F. De Armas should make his will. Phoebe, a witness introduced by the plaintiffs, says: 'he expressed a wish to make his will; this was some two weeks previous to his death; he called deponent up at night, and requested her to go after Mr. De Armas, the notary, that he wanted to make his will; that his property should not go to his relations, they having wounded him in the Havana, of which wounds he was dying.' Felix De Armas states: 'that some days previous to the receiving of the instrument, some five or six days, he was sent for by the late Joseph Chardon; deponent accordingly repaired to his house, on Levee street; Mr. Chardon then observed to deponent, that he wished to have his business arranged; deponent was the notary of Mr. Chardon, and had frequent occasions of seeing him; deponent observed to him, that whenever he was ready, he had only to send for deponent to receive his will; Chardon at this time was sick; some days afterwards Mr. Bongue called on deponent,' &c. The witness then goes on to state, that Bongue having informed him that Chardon desired to make his will, he went, &c. Jenny states, 'that when Mr. De Armas arrived, (*the very day that Bongue had gone for him,*) he asked of Mr. Chardon what he desired of him, to which Mr. Chardon replied, that he wanted to make his will.' It is therefore evident, that it was at the request of Chardon that the notary came to receive his will. With regard to the want of mention in the will of such request, I know of no law requiring such mention.

"2. The second allegation or ground is, 'that in this pretended testamentary deed, nothing shows or even indicates, that the witnesses, whose names are seen at the end of this pretended will, had been present to what properly constitutes the will, that is to say, the dictation by the testator, and the perusal (the reading I presume) to the testator, in presence of the witnesses, and that the said witnesses had

been the same whose names and christian names are mentioned at the end of the said will, and that this mention of the names of the said witnesses, made only at the end of this pretended will, is no sufficient compliance with the exigencies of the law.'

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"This appears to be an objection to the form of the will, and on examining it attentively, I infer from all its parts, that the subscribing witnesses to the will, are evidently the same whose presence is stated at the beginning, and throughout the whole instrument, wherever the witnesses are mentioned; besides, no part of the evidence shows the fact to have been different.

"3. The third allegation or ground is, 'that this pretended will has been made in the house of said Bongue, in the middle of his servants, which circumstance alone makes it suspicious.' This ground will be examined hereafter, in connexion with the allegation of fraud and violence.

"4. The fourth ground is, 'that Oliver Drolet and Jacques Imbert, who appear in the said will as witnesses, were at the time it is pretended that the said will was made, employed in the service of the said Bongue, in the gambling house kept by the said Bongue; that Laurent Garnier, now in France, who appears also as witness to the said will, was a complaisant friend of the said Bongue, who was giving him salary for feigning of really gaming in the gambling house, kept then by said P. I. Bongue, for the purpose of attracting true gamblers; that the said Laurent Garnier was the same, who, without any mission to that effect, on the part of the said Chardon, went for and brought the said Oliver Drolet and Jacques Imbert, to serve as witnesses to the said will.'

"It results clearly from the evidence, that the three witnesses to the will, to wit: Oliver Drolet, Jacques Imbert and Laurent Garnier, occupied more or less disreputable stations in the gambling concern of the defendant. In fact, the testator, the universal legatee, the witnesses, all belonged to the same class; but although it be not disputed that there are but few employments less honorable than those of a gambling house, still there is no law in this state, incapaciti-

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lating persons of that description to appear as witnesses, either to a will or any other act, or in a court of justice; nor is there any law in this state, declaring that a man in the employment of a legatee, cannot be a witness to the will. Even in France, where the law in that respect, very different from ours, prohibits the testimony of the servants of a party, it has been decided, '*that the servant of the legatee may be a witness in a public will.*' *Recueil général des lois et arrêts, par Sirey, vol. 13, part 2, page 65. Journal du Palais, vol. 36, page 525.*

"5. The fifth ground is, 'that Felix De Armas, notary public, had no capacity to draw, in a valid manner, the said will as he did, at the time, when, and at the place where he did draw it.' Felix De Armas's quality of notary being acknowledged, his capacity for drawing a will at any time, and at any place within the district of country for which he is commissioned, is beyond dispute; and I must confess, that I could not well understand the argument of the plaintiffs' counsel on this ground.

"6. The sixth ground is, 'that the will has not been written at one time, without interruption, and without turning aside to other acts.' The very same words used by our present code, article 1571, '*at one time, without interruption, and without turning aside to other acts,*' were made use of in the Civil Code, under which the Supreme Court decided the case of Seghers, attorney for absent heirs *vs.* Autheman, executor, &c., 1 *Martin, N. S.* 82. In that decision, the words 'without interruption' are considered as adding nothing to the force of the words 'without turning aside to other acts,' both phrases meaning, that nothing else shall be done, until the will is completed. That such must have been the understanding of the legislator, results evidently from the 1578th article of our present code, where the words '*without interruption, or turning aside to other acts,*' in the English side, are represented, on the French side, by the words '*de suite et sans divertir à d'autres actes.*' The French commentators on the article of the French Code, describing the formalities in the superscription of mystic wills, which requires, like our article

1578, that 'tout ce que dessus sera fait de suite, et sans divertir à d'autres actes,' observe, 'par le mot actes on entend affaires, *negotia*. On peut donner au testateur malade un breuvage, le pauser, s'il est blessé; mais on ne pourrait pas enterramprer ces formalités pour passer un bail, une vente, une procuration, au même pour écrire une lettre.' *Pandectes Françaises*, vol. 9, page 36. Unity of action and time, is all that is required by the different expressions employed in our law, as well as in the French law. Does the evidence in the present case show, that that unity was observed in the making of the will in question? From the testimony it does not appear, that any other *act* or business *negotium* was done or intervened, until the will was completed; therefore there was unity of action. The length of time which elapsed while the testament was making, and the pauses which the testator made, are insisted upon by the plaintiffs' counsel, as constituting an interruption.

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"The testimony varies with regard to that length of time. Imbert, their principal witness, contradicts himself in that respect: for in his first examination, he says 'the will was made between 5 and 6 o'clock in the evening,' which would give us, at farthest, a duration of an hour, and in his second examination, on being asked how long Mr. De Armas was employed in receiving the will, he answers, 'a long time, two or three hours at least.' The notary, Felix De Armas, positively declares, that the will was written without interruption, and he explains, that Chardon, whilst dictating his will, was suffering, and would pause some time between the different clauses, and on being asked whether he considers a pause or delay of fifteen minutes, half an hour, or an hour, as an interruption, he answers in the negative. But nothing shows that there was a division of time, or in other words, that any thing foreign to the will intervened, to disturb the unity of time and of action.

"7. The seventh ground is, 'that this pretended will has never been dictated by the said Joseph Chardon to the said Felix De Armas.' The plaintiffs, in support of this ground, rely upon the evidence of Imbert, one of the witnesses to the

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will. That witness states, 'that when the will was received, J. Chardon answered *with difficulty*, yes or no, to the questions put to him; he did not dictate it,' and on being recalled by the defendant's counsel, and cross-examined, he repeats, that Chardon did not dictate his will, but answered yes or no to what was asked him; that after the preamble of the will had been written down by the notary, Chardon *said distinctly*, that he gave liberty to his slaves, also three thousand dollars to Eugene, who is now in court, and the like sum to the other child; he then paused for a considerable time, and remained silent. The notary then being tired of waiting on him, seeing that he did not resume, asked him how he meant to dispose of his property, and whether he had not relations in France, to which he replied he had no relations in France. The notary reiterated this question to him several times, whether he had relations in France, he always appeared in difficulty to answer, but he finally answered that he had no relations in France; that after he had remained for a long time without saying any thing, the notary would ask him again about his relations, and he finally answered he had no relations in France. The notary then told him to decide upon something or another, and that if he recovered from his sickness, the will would be null and void; he asked him, that since he had no relations in France, if he had not some friend here or in France, to whom he wished to leave his property. This was repeated to him several times by the notary, after a long reflection, and finding that Chardon did not answer, the notary mentioned Mr. Bongue to him. Chardon, who was then sitting in his arm chair, turned round and looked at Bongue, who was behind him, and then told the notary to name him, Bongue, to have charge of his property; that he left the whole of his property to him. Being asked whether he recollects the precise words, which Chardon made use of when he named Bongue to take his property, the witness answers, that 'after the notary had named Bongue to him, as before stated, Chardon, after looking round towards Bongue, said, yes, name Bongue; then the notary asked him

if he wished to name Bongué his universal legatee, and he answered distinctly, that he named Bongue his universal legatee.' The same witness, in answer to questions asked of him, stated that previous to his stating so in court, he had said twenty times, that Chardon merely answered, yes or no; and among the persons to whom he most probably made the declaration, he mentions, as the only ones he can designate, Drolet and Garnier, the two other witnesses to the will, now absent, and Mr. Raymond, now in town. Being asked how he came to sign the will, which says that it was dictated by him, Chardon, when he now says that it was not so dictated, he answers that he signed after others, and that he was not acquainted with that sort of business, having been then, for the first time, called to witness such an instrument.

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"But in support of their seventh ground, the plaintiffs contended in argument, that the will was not written by the notary as it had been dictated to him, and their argument in that respect, is founded upon the declarations of the notary himself. The notary says in one part of his testimony, that the will 'was written, if not in the same words, in the same sense as *Chardon* dictated it.' In another part he says, '*Mr. Chardon dictated the dispositions, phrase by phrase, if not in the same words mentioned in the will, in words conveying the same sense and meaning.*' The notary does by no means assert, that the words used by the testator, *were not* the same as those written in the will; he only says, that *if they were not*, they were words of the same sense and meaning. Now, suppose the words were not the same, provided the sense and meaning of the words, written by the notary, were the same as those of the words used by the testator, the will would not be null; all commentators agree on the principle, that it is the identity of thoughts, and not that of words, which the law requires in such cases. *Duranton, Cours de Droit Français*, vol. 9, p. 11, No. 77. *Dalloz, Jurisprudence du 19me. Siècle*, vol. 10, p. 349. *Favard de Langlade, Répertoire de la Nouvelle Législation*, vol. 5, verbo Testament, p. 549, No. 22. *Toullier, Droit Civil*, vol. 5, p. 388, No. 419.

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"8. The eighth ground upon which the will is attacked, is the following: 'That the said will was the result of fraud and violence, used against the said Joseph Chardon, then dying, and without protection, by the said Pierre Isaac Bongue, Felix De Armas and Laurent Garnier.'

"In support of this ground, the counsel of the plaintiffs, have in argument made a very lively picture of the moral restraint and violence practised upon the testator, to have the will made as it is. The fact that when Chardon made his will, he was in the house of Bongue, the executor, and several other circumstances, have been represented as conclusive of the fraud and violence. Chardon's attachment to his family has been endeavored to be shown by a letter, which he wrote to his brother on the 25th of July, 1818, and which has been introduced in evidence, but from the whole of the testimony, the court has been forced to come to the conclusion, that his sentiments in that respect had undergone a complete change. It appears that posterior to the date of that letter, he went to France, where he made but a short stay, that he took with him, or was followed by two of his nephews; that being in the Havana he was robbed by those nephews, who even attempted to take his life, and inflicted upon him wounds which kept him lingering until his death, and that since that time he was entirely estranged from his family, and determined not to leave his property to them. Jenny, a witness, goes still further; she states that 'Chardon often spoke to her of his will after it was made, and appeared well satisfied that it was made, and that he had left none of his property to his relations; he told deponent, the reason of his not leaving any thing to his relations was, that they had attempted to assassinate him at the Havana, speaking of his nephews; and would not leave any thing to his brothers, that the nephews should not profit through them.' He expressed this opinion six months before his death, and always, for six or eight years had been of the same mind, ever since the nephews attempted to assassinate him. Besides, it is in proof, that Chardon and Bongue had had much dealing and confiden-

tial business together, long before Chardon's death. That Chardon left his own house on the advice of his physician, and went of his own accord to the house of Bongue.

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"Probably to support their allegation of fraud, the plaintiffs' petition states two circumstances, which, although I consider immaterial for the decision of this case, ought not to be passed over. The first is, 'that Bongue, after the death of Chardon, did not make an inventory of the succession, and that he hastened to collect and realise what he could of the said succession, and to leave the country, carrying away the most he could of the said estate.' Now in point of fact, the evidence shows that an inventory *was made*, (testimony of De Armas) that Bongue left this city more than one year after the death of Chardon, to go to France for the benefit of his health, and that he left considerable property here.

"Upon the whole, the court considering, 1st. That the will of Joseph Chardon, passed before Felix De Armas, notary public, of the city of New-Orleans, is in due form of law, that is to say, according to article 1571 of the Civil Code of Louisiana. 2d. That the enunciations in said will contained are true. 3d. That the said will has not been obtained by unfair or dishonest means.

"It is, ordered, adjudged and decreed, that judgment be entered in favor of the defendant, and that the plaintiffs pay the costs of this suit."

From this judgment the plaintiffs appealed.

Fourchy, Magnin and Caillard, for the appellants, made the following points.

1. The last will of the late Joseph Chardon is null and void, on account of the most material exigencies of law not being complied with.

2. It is null and void, the consent, on account of the fraud practised, not having been free.

3. The judgment of the court below must be reversed as contrary to law and evidence.

4. The last will of J. Chardon must be annulled, with judgment for the plaintiffs as his legal heirs.

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Roselius, for the defendant, contended that the allegations of fraud in the execution of the testator's will, are unsupported by the evidence in the record.

2. On the other hand the testimony shows, that all the formalities required for the validity of the will, have not only been substantially, but strictly complied with ; therefore, it should stand, and the judgment of the Court of Probates be affirmed.

Bullard, J., delivered the opinion of the court.

This is an action brought by the heirs at law of Joseph Chardon, to annul a testament purporting to have been made by public act, on various grounds as set forth in their petition. The judgment in the court below being in favor of the defendant, as executor and universal legatee, the plaintiffs prosecute this appeal.

The ground of nullity alleged by the plaintiffs is, that it does not appear from the will itself that it was read over to the testator in presence of the same witnesses who were present at the dictation, but that other witnesses may have been present than those who signed the will. The caption of the will does not name the witnesses, nor are their names mentioned at all until towards the close of the act. The notary begins by saying that the testator appeared before him, and in presence of the witnesses hereinafter named and subscribed, and towards the close of the act the witnesses are named, as having been expressly called for the purpose. That part of the act which relates to the reading of the will, as well as its dictation, is in the following words: "C'est ainsi que le présent testament a été dicté par le testateur au notaire, qui l'a écrit tel qu'il lui a été dicté, et ce de suite, sans interruption et sans divertir à d'autres actes, le tout en présence des dits témoins ; et mêmes présences le notaire ayant lu ce testament au testateur à haute et intelligible voix, il a déclaré le bien entendre et comprendre, et y persévérer comme contenant ses dernières volontés."

The plain and obvious meaning of this is, that the same witnesses whose names are afterwards inserted, and who

signed the act with the notary, were present when the will was dictated, written by the notary, and read over to the testator. We are acquainted with no rule of law which requires that the names of the witnesses should be inserted in any particular part of the testament, and it appears to us sufficient, if it is shown by the act itself, that they were present as required by the code, and that they possessed the legal qualifications. We are not driven to any thing like implication, in order to arrive at this conclusion. It is stated in explicit terms, that the same witnesses named in the will, and who signed it, were present when the same was dictated, written and read over to the testator by the notary. 30 *Sirey*, 2, 156.

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There is no rule of law, requiring the names of the witnesses to a will, to be inserted in the caption or any particular part of the testament. It is sufficient if they sign.

Independently of this objection to the form of the testament, the plaintiffs allege that it is null, because in point of fact: 1st. The formalities were not fulfilled as required by law at one time, without interruption, and without turning aside to other acts; 2d. That it was made by means of interrogations addressed to the testator by the notary, and his answers; 3d. That it was not dictated by Chardon, and written as dictated; 4th. That it is doubtful whether the testament was legally read over to the testator; 5th. That it is antedated; 6th. That the will of Chardon was not free; and, 7th. That the testament is the result of fraud, and of moral constraint.

The four last points may be dismissed from our consideration, with a single remark, that there is no evidence whatever inducing us to believe that the testament bears a false date; that it appears both by the will itself, and by the testimony of witnesses, that it was read over to the testator according to law, and that no constraint, no fraud, or no conspiracy to draw from the testator such a disposition of his property are proved; and that it is no longer permitted by our law to attack a testament, on the ground that its dispositions were the result of suggestion, hatred, anger or captation. *Article* 1470. (1479.)

We confine ourselves, therefore, to the inquiry, whether it has been shown that the testament was not dictated and

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A mere suspension of the proceedings, in making and writing a will, by the notary, for two or three hours, in consequence of the weakness of the testator, or his want of decision, or for time to reflect more maturely on the disposition of his property and affairs, when the notary and witnesses do not leave the house, is not a turning aside to other matters, so as to render the will illegal or null.

The notary is prohibited from interrogating the testator, or so to shape his inquiries, while writing his will, as to suggest a particular disposition of his property. A suggestion of the notary is proscribed as a ground of nullity, by the Louisiana Code.

written as dictated, without interruption, and without turning aside to other acts in a legal sense of those expressions.

It is shown that after the first bequests were written, the testator became silent, and for a considerable time ceased to dictate, and the notary stopped writing. How long this cessation lasted is not clearly shown; the notary says less than an hour and a half. But the witnesses and notary remained together in the room, and the delay was attributable, either to the feebleness or indecision of the testator; in the meantime it is not pretended that any other business was transacted. This, it is contended, was an interruption which vitiates the testament. We cannot yield our assent to that proposition. A mere suspension of the proceeding, in consequence of the weakness of the testator, or his want of decision, or to give himself time to collect his thoughts, or to reflect maturely on the disposition of his property, does not amount, in our opinion, to an interruption in a legal sense of the word. In some cases it might be, on the contrary, evidence of greater deliberation on the part of the testator.

With respect to the principal point in the cause, to wit: whether the will was in fact dictated by the testator and written by the notary as dictated, we will premise what we have to say on that subject, by remarking that the objection on the ground that the testator was interrogated by the notary, resolves itself mainly to one of suggestion. The notary, by asking a question as to what disposition the testator wishes to make, might so shape his inquiry as to suggest a particular disposition, and might amount to an artful insinuation, spoken of by some of the French authorities cited in the argument. What is this but suggestion, which is now proscribed as a ground of nullity by our code? It is shown that the notary did several times inquire whether the testator had not relatives and friends in France. If this was a suggestion to the testator, not to forget his distant relatives in his last moments, the plaintiffs, who are those persons, could not reasonably complain of it.

The evidence relating to the dictation and writing of the will, is certainly contradictory, and even irreconcilable. On

the one hand, Imbert, one of the subscribing witnesses, swears at first that the testament was not dictated by the testator, but that he barely answered yes or no to the questions put to him by the notary. On a subsequent examination, he qualifies this, by admitting that some of the dispositions of the will were dictated. On the other hand, the notary public, Mr. De Armas, testifies that the testament was written by him, according to the dictation of the testator, if not word for word, at least that he gave his sense and meaning.

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In support of the will, we have the act itself, duly certified under the official sanction of the public officer, fortified by his oath and three subscribing witnesses, one of whom alone has been examined to contradict it. The other witnesses appear to be still alive, but their testimony has not been procured. Under those circumstances we concur with the Court of Probates, that the plaintiffs have not shown enough to authorise us to declare the testament null and void.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
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The appellant is bound to cite in the appeal, all the parties before whom, contradictorily in the inferior court, the judgment was obtained, which is appealed from.

So the plaintiff who appeals, is bound to cite both the defendant and his warrantor, before the appeal can be heard. Further time will be given to cite in all the parties.

This is an action to recover from the defendant, Bagneries, two slaves in his possession, which are claimed as the property of the plaintiffs.

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The defendant set up title to the slaves in question, as purchaser at a marshal's sale. He cited the plaintiffs and defendant in the execution, which issued from the United States District Court, under which the sale took place, to defend his title as warrantors.

On hearing the cause, the parish judge was of opinion the slaves belonged to the original defendant, and gave judgment in his favor. The plaintiffs appealed.

In taking the case to the Supreme Court, the defendant alone was cited in the appeal. The warrantors were omitted.

Canon, for the defendant and appellee, moved to dismiss the appeal, because all the appellees, and especially the parties called in warranty were not cited.

Preston, for the appellants, contended that as the judgment was in favor of the defendant alone, he was the only party to be cited. These parties being plaintiffs and defendants, whether the reversal of the judgment may effect others who are not parties, is not to be inquired into.

2. It was not for the plaintiffs to cite the warrantors; it was for the defendant to do so, if he wished their aid on the appeal. *Code of Practice*, 388.

3. There was no judgment for or against the warrantors, and had they been cited in the appeal, they would have prayed for its dismissal, as to them, because there was no judgment for or against them.

4. Bagneries cannot move for the dismissal of the appeal as to himself, because he is cited; and the inquiry is, was his objection properly made, by which the plaintiffs' testimony was excluded. If this question be decided in his favor, then he succeeds, otherwise the case must be remanded.

Martin, J., delivered the opinion of the court.

This is a petitory action in which the defendant cited in his vendor as warrantor. There was judgment against the plaintiffs, and they appealed.

The defendant comes into court, and prays that the appeal be dismissed on the ground that his warrantor is not made a party to the appeal.

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The plaintiffs' counsel contends, that he has nothing to discuss with the defendant's warrantor; that if the defendant deems it his interest that the warrantor be a party to the appeal, he ought to make him so by citation or notice.

We think that every party who seeks redress at our hands, in this court, and asks the reversal or modification of a judgment, is bound to bring in all the parties, contradictorily with whom, such judgment was rendered in the court below.

The appellant is bound to cite in the appeal, all the parties before whom, contradictorily in the inferior court, the judgment was obtained, which is appealed from.

In a petitory action, the party called in warranty has the same (or very nearly the same) interest as the defendant, in a judgment against the plaintiff. The latter, therefore, when he seeks to be relieved from the effects of such a judgment, must bring into this court all the parties in the original suit, who have an interest to prevent the reversal or modification of such judgment.

So, the plaintiff who appeals, is bound to cite both the defendant and his warrantor, before the appeal can be heard. Further time will be given to cite in all the parties.

In this case, however, there appears to be no necessity to dismiss the appeal. The case is a new one, and justice may be attained, otherwise than by driving the parties out of court.

It is, therefore, ordered, that the plaintiff and appellant be allowed until the first Monday of July next, to cite the warrantor in the appeal.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The fact of a slave being taken to the kingdom of France, or other country, by the owner, where slavery or involuntary servitude is not tolerated, operates on the condition of the slave, and produces immediate emancipation.

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When a slave once becomes free by the operation of the laws and customs of another country or state, to which he is taken by his owner, it is not in the power of the latter, ever to reduce him again to slavery.

This is a suit for freedom. The cause was before this court at June term, 1835. 8 *Louisiana Reports*, 475.

On the return of the cause to the District Court, the plaintiff filed a supplemental petition, in which she alleges, that her daughter Josephine, whose emancipation and freedom she claims, was taken to France by the defendants, a country in which slavery is not tolerated, and that she thereby became free; that the defendants, since their return to this state, have maliciously imprisoned her said daughter, for which she claims five hundred dollars in damages. She prays that her daughter Josephine be declared free, and that she have judgment for damages, as alleged.

The defendants pleaded a general denial, and further averred that if even the facts were true as alleged, the plaintiff's daughter, Josephine, was not entitled to her freedom.

Upon these pleadings and issues the cause was submitted to a jury, under the evidence that no slavery was tolerated in France, and that the mulattress, Josephine, was taken there as alleged. The district judge charged the jury as follows, which was excepted to by the defendants' counsel:

"That if the plaintiff's daughter, Josephine, was taken by the person claiming her services as a slave to a foreign country, where slavery does not exist, and is not tolerated, and by the laws of which such slave would be entitled to her liberty, for the purpose of residence, even temporarily, that is, for any other purpose than a mere passage through such country, and perhaps even then, the person so taken to such country would become free, and that freedom once impressed upon an individual was indelible; and the *status*, or condition in society of such party, could not be changed, unless it was shown that such person was condemned as the slave of punishment, or in some other way legally condemned to slavery.

"It is for the jury to decide the fact, whether the plaintiff's daughter, Josephine, was taken to France on a mere passage

through the country, or for the purpose of temporary residence. That in the opinion of the court, it makes no difference, that the donee or owner of the slave, as the defendant, was a minor at the time of the voyage to France, and could give no legal consent; because the condition of freedom was *de facto* impressed on the person held to service, so carried to a foreign country, without having ran away or escaped; and if damages accrued to the minor, by the loss of service of the person so held to service, the minor must look to her guardian or tutor for reparation in damages; but the right to personal freedom by such residence, in such foreign country, was acquired by, and stamped upon the person so previously held to such service, and such a person is entitled to freedom."

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The jury returned a verdict, "that Josephine is entitled to her freedom, but not entitled to damages." From judgment confirming this verdict, the defendants appealed.

Canon, for the plaintiff.

J. Seghers, for the defendants, contended, that slaves attending their masters in travelling or sojourning in the kingdom of France, are not thereby emancipated. They do not become free, unless their owners remove with them to that country, with the intention of residing there. 2 *Martin*, N. S., 401. 2 *Marshall's Reports*, 476, *et seq.*

Mathews, J., delivered the opinion of the court.

This case involves a question of freedom, in relation to the condition of a mulattress, who is held to slavery by the defendants, as a *statu liberi*. The cause was before the court in June term of 1835, and was remanded for a new trial. Before the last trial in the court below, the plaintiff filed a supplemental petition, by which the mother and actual guardian of her daughter claimed freedom for her, in consequence of her having been taken by her owners to the kingdom of France, &c.

The fact of a slave being taken to the kingdom of France or other country, by the owner, where slavery or involuntary servitude is not tolerated, operates on the condition

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of the slave, and
produces imme-
diate emancipa-
tion.

When a slave
once becomes
free by the ope-
ration of the laws
and customs of
another country
or state, to which
he is taken by
his owner, it is
not in the power
of the latter,
ever to reduce
him again to
slavery.

The main question in the cause, as it now stands before the court, is whether the fact of her having been taken to that kingdom by her owners, where slavery or involuntary servitude is not tolerated, operated on the condition of the slave, so as to produce an immediate emancipation. That such is the benign and liberal effect of the laws and customs of that state, is proven by two witnesses of unimpeached credibility. This fact was submitted to the consideration of the last jury, who tried the cause under a charge of the judge, which we consider to be correct, and was found in favor of the party whose liberty is claimed. Being free for one moment in France, it was not in the power of her former owner to reduce her again to slavery.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

CONSOLIDATED ASSOCIATION BANK vs. FOUCHER ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

When the parties to a note, secured by mortgage, have not been put in default by a demand or protest for non-payment, and there is no stipulation, that the party failing to comply with the agreement, shall be deemed to be in default by the mere act of failure, under the 1905th article of the Louisiana Code, interest cannot be demanded.

But where it was stipulated in the mortgage, that the debtors might prolong payment of part of the note, by paying a discount of one half at the end of the year, to be credited on it; and on failure, to be liable for the whole sum, principal, interest and costs: *Held*, that the party was bound to pay interest from the time the note became due, without any formal demand.

In notes given to banks, if no rate of interest be specified, it will be inferred that the contract was made in reference to the charter, and governed by the rate of interest fixed therein.

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The Bank of the Consolidated Association of Louisiana, obtained an order of seizure and sale, on a note and mortgage, executed to secure the sum of ten thousand dollars, which the defendants, Antoine Foucher, sen'r, and his wife, borrowed from the bank, the 30th December, 1830, payable one year after date.

The mortgage contained a stipulation for prolongation of payment. No rate of interest was specified, but the bank charter authorised it to take interest at the rate of eight per cent. per annum. The note was due the 30th December, 1831. No payment was made on it, or prolongation of payment obtained; it lay over without protest until the 27th January, 1836, when the executory proceedings were commenced on the mortgage.

The defendants objected to paying interest, as the note was not protested, or any demand made on them before suit.

The district judge decreed the payment of interest at the rate of eight per cent. per annum, from the time the note became due until paid. The defendants appealed.

Derbigny, for the plaintiffs.

Deny, contra.

Bullard, J., delivered the opinion of the court.

The plaintiffs having obtained an order of seizure and sale, of certain property mortgaged to the bank, to secure the payment of a loan, the defendants took a rule on them to show cause, why the order of seizure should not be set aside on their paying the sum of ten thousand dollars, with interest from the day the same was issued. The court discharged the rule, and ordered the sheriff to proceed on the writ, to make the principal sum, with interest, at eight per cent. from the 30th of December, 1831, when the debt fell due; and the defendants have appealed.

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When the parties to a note secured by mortgage, have not been put in default by a demand or protest for non-payment, and there is no stipulation, that the party failing to comply with the agreement, shall be deemed to be in default by the mere act of failure, under the article 1905 of the Louisiana Code, interest cannot be demanded.

But where it was stipulated in the mortgage, that the debtor might prolong payment of part of the note, by paying a discount of one half, at the end of the year, to be credited on it, and on failure, to be liable for the whole sum, principal, interest and costs: *Held*, that the party was bound to pay interest from the time the note became due, without any formal demand.

In notes given to banks, if no rate of interest be specified, it will be inferred that the contract was made in reference to the

The promissory note, the payment of which was secured by the mortgage in question, contains no stipulation for interest. It was made payable at a *fixed day* at the banking house of the plaintiffs, nor does it appear that the note was protested for non-payment, nor any formal demand before issuing the writ of seizure, about four years after it fell due. It appears to us clear, therefore, that the defendants have not been put in default by a demand, and that neither the note nor the mortgage contain any provision that the party failing to comply with their engagement shall be deemed to be in default, by the mere act of their failure, according to article 1905 of the Louisiana Code. If the defendants, therefore, be bound to pay interest from the time the note fell due, it must be by virtue of some stipulation contained in the act of mortgage.

By that act, it was stipulated that the defendants might at the time the note should fall due, prolong the payment of one half the sum for another year, upon the payment of a discount for that period, the note to remain in possession of the bank, and the payment which might be made to be credited upon it. It was further stipulated, that if they should fail to make the payment of one-half, they should lose the advantage of prolonging the payment, and shall be subject to be prosecuted for the whole sum due to the association, as well principal as interest, and costs due and incurred, and to become due and be incurred, "*tant en capital qu'en intérêt et frais échu, et faits et à échoir et à faire.*"

This clause seems to contemplate the payment of interest on the defendants failing to comply with the stipulation in their favor, that the payment of one-half might be prolonged for another year, upon their paying one-half the principal, and discount on the other half for another year; it would be a forced construction of this contract, which should enable the defendants to gain any advantage from their own failure, to avail themselves of a stipulation in their favor. They were promised a delay of another year, for one half the debt, on the payment of interest, and now they seek to avoid the payment of interest altogether, except from judicial demand,

although they have enjoyed in fact, a greater indulgence than was promised them by their contract with the bank. It is true the rate of interest is not mentioned, but we concur in opinion with the judge of the District Court, that the contract was made with reference to the charter of the bank, which allows eight per cent.

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charter, and governed by the rate of interest fixed therein.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

YARD & BLOIS' SYNDICS vs. SRODES.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the defendant was indebted to a commercial house, and executed two notes which he delivered, not in full liquidation of his account, but to enable the house to raise money by negotiating them, and they were passed to his credit; but on being returned protested, he is charged with their amount and costs, they are not thereby novated, and may be transferred to a *bond fide* holder, as evidence of an existing debt.

This is an action by the holders of a promissory note, against the drawer, executed at Louisville, Kentucky, May 27, 1831, payable fifty days after date, to the order of John B. Guthrie, by whom it was endorsed in blank, for the sum of one thousand three hundred dollars. The plaintiffs allege the note was protested in Kentucky for non-payment, and transferred to them; that the defendant has an interest of one-fourth of the steamer Mediterranean, which they pray may be attached, and that they have judgment for the amount of the note sued on.

The defendant by his attorney, pleaded a general denial to the allegations in the petition; admitted the execution of the note, but averred that it was drawn by him solely for the

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accommodation of Shall, Cantrel & Co., whose names are endorsed on it; that no consideration whatever was received by him; that on the contrary, said firm were at the time, and still are indebted to him. That said note was taken up and paid at maturity by Shall, Cantrel & Co., and transferred after it became due, which entitled the maker to all the defences and equities that he would have, if it were in the hands of the original payee. He prays judgment in his favor, and costs.

M'Kee, Clark & Co., of Pittsburg, intervened as owners of three-fourths of the steamer Mediterranean, which was attached, alleging that the defendant, Srodes, had a legal title only to the other fourth, but that his interest was incumbered with liens, privileges, &c., and prayed to have the boat released.

The petition of intervention was excepted to, and overcraved of the titles of the intervenors, and the documents showing the liens and claims on the defendant's interest in said steam-boat.

A witness for the plaintiffs states, that at the time the note sued on bears date, the account current of Srodes, with Shall, Cantrel & Co., was made out, and Mr. Shall went from Nashville to Louisville to settle. That said account was nearly closed by two notes of one thousand three hundred dollars each, one of which is now sued on. The balance was to have been paid in cash, but it was not done. That said Srodes was indebted to Shall, Cantrell & Co., when the notes in question were given, and when they became due. Witness was book-keeper to Shall, Cantrel & Co., at the time of the transaction. The notes were negotiated by Shall, Cantrel & Co., with Forsythe & Co., of Louisville, and when they became due, were protested for non-payment, and taken up by the former firm. The one in suit was afterwards transferred to the plaintiffs.

A witness for the defendant says, that being in the employment of the latter, he called on Shall, Cantrel & Co. to make a settlement between captain Srodes and them. This was in the year 1833, and that they furnished him with the

following accounts, marked A and B. Deponent objected to the accounts, as not allowing sufficient credits to the defendant.

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A

"Messrs. Srodes & Guthrie, say Mr. Wm. Srodes,
1831, In account with Shall, Cantrel & Co.
July 2, To balance per account rendered,.....\$436 81
1831, CR.
July 12, By sundry credits, amounting in all, to...\$1,376 01
By balance,.....\$939 20

B

Messrs. Srodes & Guthrie,
1831, In account with Shall, Cantrel & Co.
July 2, To balance per account rendered,.....\$271 72
" 4, " sundries, (specified)..... 144 31
" 25, " Our acceptance of Forsythe & }
Co's. draft, to take up your note } 1,329 24
of \$1300, which was protested, }
Sept. 3, " Our acceptance of Forsythe & }
Co's. draft, to take up your note } 1,328 23
of \$1300, which was protested, }
\$3,073 50

CR.

By balance due W. Srodes,.....\$939 20
" your two notes,.....2,600 00
\$3,539 20

You are entitled to a credit of four hundred and sixty-five dollars and seventy cents, on note of one thousand three hundred dollars, which is passed to Cantrel & Allen."

The district judge, before whom the cause was tried, on the evidence adduced by the parties, was of opinion the plaintiffs could not recover. Judgment of non-suit was rendered, from which the plaintiffs appealed.

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Carleton and Lockett, for the plaintiffs.

1. The district judge erred in considering this note as belonging to an account between Srodes, and Shall, Cantrel & Co., which must be settled by a suit between the parties. There is no evidence to this effect.

2. This suit is instituted on the note itself, independent of any account. It is between different parties, and the plaintiffs have nothing to do with accounts and transactions between Srodes and Shall, Cantrel & Co.

3. The judgment should be reversed, and the cause remanded for further proceedings and final judgment.

J. Slidell, for the defendant.

1. The accounts of Shall, Cantrel & Co., marked A and B, show that defendant was debited by them in account for the acceptance of Forsythe & Co's drafts, drawn to provide for this note, and another of the same sum. If he were now made liable for it, he would be made to pay the same debt twice.

2. The note having after maturity come into the possession of the payees, Shall, Cantrel & Co., and having by them been charged in their accounts, which appear to have been long and complicated; they could not have sued on it as an isolated transaction, it having been merged in the general account. They could not by a subsequent transfer to plaintiffs give them a greater right, than they themselves possessed.

3. The evidence of Spear, one of the witnesses shows payment of the balance due Shall, Cantrel & Co., including the two notes of one thousand three hundred dollars each.

Bullard J., delivered the opinion of the court.

The plaintiffs sue as holders of a promissory note, subscribed by the defendant, and payable to the order of one Guthrie, and endorsed by him. The defendant admits the execution of the note, but avers that it was drawn solely for the accommodation of Shall, Cantrel & Co., whose names are upon it; that no consideration was received for the same, but that on

the contrary, that house was, at the time the note was given, and yet is indebted to the respondent, in a large amount; that Shall, Cantrel & Co. took up the note at its maturity, and that it was not transferred to the plaintiffs, until long after it was due, and is in the hands of the plaintiffs subject to the same defences, which could be made against Shall, Cantrel & Co.

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SHODES.

The plaintiffs have appealed from a judgment, dismissing their petition, with costs.

The evidence shows, that the note was transferred long after it was due, and consequently, any equitable or legal defence, of which the defendant might avail himself as against Shall, Cantrel & Co., may be inquired into in the present suit.

It appears that the defendant, being indebted to Shall, Cantrel & Co. in account current, gave the note in question, together with another of the same amount, endorsed by Guthrie, not in full liquidation of the account, but to enable them to raise money by negotiating them, and that they were negotiated through the house of Forsythe & Co., at Louisville, who also endorsed them. Not being paid at maturity, they were protested and taken up by Forsythe & Co., who returned the notes to Shall, Cantrel & Co., who reimbursed to the former, the amount, together with costs of protest and damages. Shall, Cantrel & Co. then charged the present defendant in their account, with the amount paid to Forsythe & Co., and credited him at the same time with the original amount of the two notes. The note in contest in this suit, was afterwards transferred to the present plaintiffs.

This statement of facts shows, that the former part of the defence, to wit: that the note was given without consideration, and merely for the accommodation of Shall, Cantrel & Co., is not sustained by the evidence. The defendant was really indebted to that house at the time, in perhaps a larger sum, and if he had paid the note, he would have been entitled to a credit for that amount on his account. The

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only question, therefore, is, whether when the note was taken up by Forsythe & Co., and remitted to that house, it lost its character as evidence of an existing debt, and merged in the account current, so that Shall, Cantrel and Co. could not have maintained an action on it, independently of the general account to be settled between them and the defendant.

Where the defendant was indebted to a commercial house, and executed two notes which he delivered, not in full liquidation of his account, but to enable the house to raise money by negotiating them, and they were passed to his credit, but on being returned protested, he is charged with their amount and costs, they are not thereby novated, and may be transferred to a *bona fide* holder, as evidence of an existing debt.

It is said that as soon as the note was returned, it formed nothing more than an item in the account, and that Shall, Cantrel & Co. could not transfer a part of that account, so as to divide their action against the defendant; but it is obvious, that at least the note itself formed the best, and perhaps exclusive evidence in support of that item, and for that purpose at least, it was still evidence of an existing debt. Such an entry did not amount *per se* to a novation; but in point of fact, the notes, together with the charges of protest, formed the item on the debit side of the account, while at the same time Srodes is credited with the two notes on the other side; so that in effect he is charged with nothing more than the charges of protest and damages, to wit: twenty-nine dollars and twenty-four cents on one note, and twenty-eight dollars and twenty-three cents on the other; and if that account, as stated, had been finally closed and receipted, it would show the two notes still outstanding, and a judgment for the balance of that account would not bar an action on the two notes.

We are, therefore, of opinion, that the note sued on, is by itself evidence of a debt due, and was still susceptible of being transferred, subject to any offsets to which it would be entitled in the hands of the transferors. The right of the plaintiffs to recover, does not depend upon the will of the transferors, but in our opinion, they ought to recover the amount, except so far as the defendant may prove it has already been extinguished by payments, compensation, or any just credits. But the evidence does not enable us to say how much is really due upon the note, and the case must be remanded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, that the case be reinstated, and remanded for a new trial; and that the defendant and appellee pay the costs of the appeal.

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vs.
DICKSON.

BRADSHAW ET AL. vs. DICKSON.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The act of the territorial legislature, passed 22d April, 1806, requiring courts of justice to stop all proceedings against members of the legislature, in actual attendance on legislative duty, and claiming their privilege, is not repealed or superseded by the adoption of the constitution of Louisiana.

A member of the legislature in actual attendance, can claim his privilege, and stop the proceedings in a trial against him after it has commenced; and a refusal to allow his privilege at any time or stage of the cause, is ground for reversal of the judgment against him.

This is an action by the holders and endorsees of a promissory note for seven hundred and twenty-nine dollars and forty cents, against the defendant as the last endorser. The note was regularly protested for non-payment at the Branch Bank of the United States, in New-Orleans, and due notice thereof given to the endorsers.

The defendant pleaded several exceptions, which were overruled. He then answered to the merits, and pleaded various matters in defence. When the cause was on trial, the defendant's counsel moved for a continuance, on the following grounds, which was refused, and a bill of exceptions taken to the opinion of the court.

"Be it remembered, that on the trial of this cause, and after the counsel for the plaintiffs had proceeded in opening the case to the jury, the defendant, by his counsel, moved

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that the cause be continued, on the ground that the defendant was a member of the house of representatives, and *was then in actual attendance of the sessions* of the legislature, then sitting. The court, however, overruled the objection, though the fact as stated was admitted to be true; to which decision the defendant, 'by his counsel, excepts,' &c. The judge added :

"1. The claim of privilege was made too late.

"2. All the privileges of members of the legislature are fixed by the constitution, and cannot be increased."

The act of the legislative council of the territory of Orleans, passed April 22d, 1806, section 2, provides, that "each and every court of this territory shall cause to stop and cease all proceedings in all and every cause, suit or action before them pending, against any *member of the legislative council* or house of representatives, *during their attendance at the session* of said legislature, and in going to and from the same."

The constitution of Louisiana, adopted in 1812, article 2, section 20, says : "The members of the general assembly shall in all cases, except treason, felony, breach of surety of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to or returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place."

"All laws now in force in this territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed by the legislature. *Ibid. article 7, Schedule, section 4.*

The case was argued and decided upon the foregoing facts, stated in the bill of exceptions, and the act of 1806 and provisions of the constitution.

The district judge proceeded with the trial to judgment, which was rendered against the defendant. He appealed.

Jones, for the plaintiffs.

Schmidt, contra.

Martin, J., delivered the opinion of the court.

The defendant has appealed to this court, and claims the reversal of a judgment rendered against him, on the ground that the court refused to suspend proceedings in his case and allow him his privilege, he being at the time of the trial a member of the legislature, and in actual attendance in the house of representatives.

The privilege claimed is set up under an act of the territorial legislature, passed in 1806. 1 *Morreau's Digest*, 648.

The District Court decided, that the privileges of members of the general assembly are fixed by the constitution, and that the application in this case came too late.

It is clear that the privilege claimed, and secured to the members of the legislature by the constitution, cannot be changed. But that which is now demanded was created by a law which was enacted long anterior, but, it is believed, is not repugnant to the constitution, and which the convention has declared shall remain in full force and effect until repealed by the legislative authority.

It appears to us that, although the District Court was not informed of the character of the defendant, and of his attendance in the house of representatives, until after the plaintiff had proceeded to open his case, even then all proceedings ought to have been suspended, and the trial put off or stopped.

The members of the legislature enjoy, in common with their constituents, the right of attending personally to their suits in court. It would be equally inconvenient to them, as it would be injurious to the public service, if the members were compelled to leave the houses in which they are sitting, and in actual attendance, to go to court and claim their privilege, or attend the trial of their suits. The law has, therefore, made it the duty of every court, to cause all the proceedings in suits in which members of the legislature, in actual attendance, are parties, or are concerned, to cease while their time is employed in the service of the public.

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The act of the Territorial legislature, passed April 22, 1806, requiring courts of justice to stop all proceedings against members of the legislature in actual attendance on legislative duty, and claiming their privilege, is not repealed or superseded by the adoption of the constitution of Louisiana.

A member of the legislature in actual attendance, can claim his privilege, and stop the proceeding in a trial against him, after it has commenced, and a refusal to allow his privilege at any time or stage of the cause, is grounds for reversal of the judgment against him.

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POYDRAS
vs.
TAYLOR.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside, and the cause remanded for a new trial; the plaintiffs and appellees paying the costs of the appeal.

POYDRAS vs. TAYLOR.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

The heirs succeed to all the rights of the ancestor, and among other rights devolving upon them, is that of suing and compelling a compliance with the intentions of the ancestor, as expressed in his last will and testament. So, where the testator provided in his will, that his slaves should be sold with, and as attached to the plantations on which they were found at his death, and the purchaser under the conditions of the will was about to alienate them separately: *Held*, that the heir can maintain an action in behalf of the slaves, to prevent their sale, in violation of the conditions of the will, and compel a compliance with the *intentions* of the testator, as expressed therein.

This is an action by the heir, to compel a compliance with the last will and testament of his ancestor.

The plaintiff alleges, that by his last will and testament, dated April 16, 1822, the late Julien Poydras, of the parish of Pointe Coupée, directed that all the slaves he should leave at his death, be considered as attached to one or the other of his plantations, and be sold with them, the purchaser thereof obligating himself, his heirs and assigns, to liberate all the said slaves at his own expense, twenty-five years after the said sale; to take care of such as should arrive at the age of sixty years, give them an annual allowance of twenty-five

dollars, and not require any manual labor from them. The plaintiff further alleges, that Julien Poydras died in 1824; that his plantations and slaves were sold under the conditions of his will, in 1825, and that one of said plantations, with the slaves attached to it, was sold by the testamentary executors, to one Charles Stewart, who sold it to Barrow, and the latter, by public act dated in March, 1831, sold it to William Taylor, the present defendapt, with the conditions expressed in the will of Poydras, recited and contained in said act, and the purchaser bound himself to comply therewith; but that the said defendant, in violation of his obligation, has sold several of said slaves, (whose names are specified,) to different purchasers, separate and apart from the plantations to which they were attached. He therefore alleges, that as one of the heirs of the late J. Poydras, he is a party concerned under a clause of said will, which not only authorises, but solicits the assistance of all humane persons, in behalf of said *statu liberi*, whose privileges and rights are thus violated; wherefore he prays, that the defendant, and the persons to whom he sold the negroes in question, be cited, and that said sales be rescinded, the *statu liberi* restored to the plantations from whence they were taken, and that the defendant be enjoined from selling them, except according to the dispositions and conditions of the will, &c.

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The defendant excepted to the right of the plaintiff to maintain this action as heir of his ancestor, in behalf of said slaves, or in any manner, and prayed to be dismissed with his costs allowed.

The case was tried on this issue before the court. The district judge who presided at the trial, being of opinion the plaintiff had not shown such an interest in the matter as would entitle him to maintain the action, the exception was sustained, and judgment rendered thereon in favor of the defendant; from which the plaintiff appealed.

L. Janin, for the plaintiff and appellant.

Mazureau, for the plaintiff, made a written argument in this, and the case of the same plaintiff against Madam Mourain.

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Mitchell, for the defendant, denied the right of the plaintiff to maintain this action, and contended that the judgment of the District Court was correct, in sustaining the defendant's exception to the right of action.

2. A slave for years or *statu liberi*, can only appear in court to claim his freedom, or the protection of the laws, when an attempt is made to carry him out of the state. The only contract he can make, is that relating to his freedom or emancipation. *Louisiana Code, articles 174, 177 and 194. 4 Martin, N. S.*

3. In testamentary dispositions, impossible conditions, or conditions *contra bonos mores*, are null and void. *Louisiana Code, 1506, 2026.*

Martin, J., delivered the opinion of the court.

The petition states, that sundry slaves mentioned therein, were part and parcel of the estate of the late Julien Poydras, deceased, the ancestor of the plaintiff, who in his last will and testament directed that all his slaves should be considered as attached to such of his plantations on which they were respectively employed, and that they should be sold with such plantation, under the special condition that they should likewise be set free at a certain age and after a certain period, with the privilege of remaining thereon, and being supported and allowed a fixed sum or annual compensation, free from labor.

That one of the defendants acquired the slaves named in the petition by purchase under these conditions and restrictions, who, in violation of them, has sold and conveyed them separately and apart from the plantation to which they were attached, to other purchasers.

The object of the present suit is, to maintain the conditions and requirements of the will, and to have the sale of the executor to the present defendant and vendee cancelled and annulled, for a violation of its conditions.

The capacity of the plaintiff, who is one of the heirs of the late Julien Poydras, to maintain this action, and see that the will of his ancestor be faithfully executed, was denied ; an

exception to this effect was put in by defendant, and sustained by the court. The plaintiff appealed.

It is true, the plaintiff and appellant declares himself the protector of the slaves in question, whose rights or privileges under the will are endangered. It is also clear, that neither any of the slaves themselves, nor any other person as a *prochain ami*, could institute a suit for their sole and immediate benefit. But the executors of the deceased owner of these slaves, if they were not *functi officii*s, and his heir since the expiration of the office of the executors, have the undoubted right to interpose and prevent a violation of the testator's intentions as expressed in his will, and to demand a specific performance of the conditions of the sale made in conformity to it. The heir can compel, either the payment of damages for its violation, or claim the rescission of the sale for a breach of the conditions under which it was made. The plaintiff, as heir, possesses this right, which is not impaired by the avowal that the object for which this right is exercised, is to protect and carry into effect the benevolent intentions of his ancestor.

The right being indivisible, it is no legal objection to its exercise that all the heirs have not joined in this action.

It has been also objected by the counsel for the defendant, that the condition of the will of the late Julien Poydras is illegal, null and void, and that no breach of such an instrument can be made the basis of an action. This objection goes to the right of the plaintiff to recover, and not to his capacity to sue; which is the only question involved in this case. The heirs succeed to all the rights of the ancestor; among which is their duty to see his *intentions*, as expressed in his last will and testament, faithfully executed and carried into effect.

In the present case, the value of the succession of the ancestor of the plaintiff has been much lessened and diminished by the conditions under which it was sold. The interest of the heirs is concerned by the obvious diminution of the price, in a sale to which, by the will under consideration, very onerous and burdensome conditions were annexed.

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The heirs succeed to all the rights of the ancestor, and among other rights devolving upon them, is that of suing and compelling a compliance with the intentions of the ancestor, as expressed in his last will and testament.

So, where the testator provided in his will, that his slaves should be sold with and as attached to the plantations on which they were found at his death, and the purchaser under the conditions of the will, was about to alienate them separately: *Held*, that the heir can maintain an action in

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behalf of the
 slaves, to pre-
 vent their sale,
 in violation of
 the conditions
 of the will, and
 compel a com-
 pliance with the
intentions of the
 testator, as ex-
 pressed therein.

They may certainly avail themselves of the breach of these conditions, to preserve and protect the intention of the testator and the objects of his benevolence, when by the very fact of the diminution of price, at the sale of his succession, they parted with a very valuable consideration.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the defendant's exception overruled, and the case remanded for further proceedings; the appellee paying the costs of the appeal.

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**APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
 OF THE SECOND PRESIDING.**

The heir who succeeds to the rights of his ancestor, may, after the executors are discharged, enforce the provisions of the ancestor's will, and see that his intentions are carried into effect against purchasers; although the heir has no other interest in the matter.

So where the testator provided in his will, that his slaves, after his death, should be kept on and attached to the plantations on which they were employed, and that the purchaser should be required to set them free after twenty-five years, and emancipate and support, without labor, and give an annual stipend to such as were sixty years old, &c.: *Held*, that the purchaser could not alienate such slaves apart from the plantation, and was bound to comply with the conditions and provisions of the will.

This is an action by the heir, as protector of certain slaves, and to have executed his ancestor's will, in relation thereto.

Julien Poydras departed this life in the year 1824, having two years previously made a will, containing, among others,

the following dispositions: "Les ventes de mes habitations sous le rapport des esclaves de l'un et de l'autre sexe qui m'appartiennent et qui en dependent, et tous mes esclaves doivent être regardés comme attachés à l'une d'elles, seront annoncées devoir être faites et seront en effet consenties avec l'obligation qui sera imposée aux acquéreurs de ces mêmes habitations, leurs héritiers ou ayans-cause, et avec l'obligation qu'ils contracteront formellement d'affranchir de tous les liens de l'esclavage tous les esclaves de l'un et de l'autre sexe qui seront vendu avec ces mêmes habitations, mêmes les enfans nés ou à naitre, de sexe féminine faisant partie de ces mêmes ventes, et ce après jouissance non-interrompue de vingt-cinq ans de ces mêmes esclaves, à compter du jour de la vente; et tous les esclaves faisant partie de ces mêmes esclaves qui, à l'époque de vingt-cinq ans révolus n'auraient pas atteint l'âge voulu par la loi pour leur affranchissement légal, seront tenus de travailler pour et au profit des dits acquéreurs, leurs héritiers ou ayans-cause, jusqu'au moment d'être parvenus à l'âge légal pour pouvoir être libres, comme aussi les dits acquéreurs de ces mêmes habitations pour eux ou leurs héritiers ou ayans-cause, s'obligeront de soigner et traiter avec humanité, et de conserver sur ces mêmes habitations, sans obligation de travail, tous les esclaves de l'un et de l'autre sexe faisant partie de ceux qu'ils auront acquis de ma succession et qui auront atteint avec evidence l'âge de soixante ans; et même de leur donner à chacun d'eux vingt-cinq piastres par an pour leur existence et soulagement de leur vieillesse. Ces conditions sont de rigueur, et toute personne au nom de l'humanité, et particulièrement les officiers public dans l'état, sont par moi autorisés et appelés à les faire exécuter et respecter."

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Madam Mourain is the owner of a plantation and a number of slaves, purchased at the public auction of the estate of the late Mr. Poydras, which sale was made in conformity to the clauses and conditions of the will.

In January last, Madam Mourain advertised for public sale, the plantation in three different lots, and the slaves

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Benjamin Poydras de Lalande, styling himself the protector of a number of slaves, filed a petition and order for injunction, in which he states:

"That as one of the heirs of the late Julien Poydras, Esq., deceased, his uncle, and out of respect for his memory, your petitioner finds himself in duty bound, since the executors of the said Julien Poydras have been duly discharged, to see certain clauses of the last will and testament of said Julien Poydras, in favor of all his slaves, faithfully executed.

"Your petitioner therefore further shows, that one of the clauses aforesaid, expressly ordains, that 'the slaves of the testator shall be sold with the several plantations to which said slaves respectively belong, and that the purchasers, their heirs and assigns, shall be formally bound to set free all the slaves of both sexes that shall be sold with the aforesaid plantations, after an uninterrupted possession of twenty-five years from the day of sale; and all the slaves belonging to the said plantations, who at the expiration of twenty-five years should not have arrived at the age prescribed by law to be set free, shall be bound to work for the benefit of the said purchasers, their heirs and assigns, till they have attained the lawful age to be set free.'

"And your petitioner further shows, that another clause of said last will and testament expressly ordains, that 'the said purchasers of the said plantations shall bind themselves, their heirs and assigns, to take care of, (*soigner*,) and to treat with humanity, and to keep (*conserver*) on the aforesaid plantations, without being bound to work, all the slaves of both sexes, making part of those acquired by said purchasers, and who shall have arrived at the age of sixty years; and are to pay annually to each of them twenty-five dollars a year, for their living and existence, and to alleviate their old age: those conditions must be rigorously executed.' As the whole will more fully appear by the said last will and testament, an authentic copy of which is hereto annexed for a

greater certainty, and which your petitioner prays to be permitted to refer to.

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“Your petitioner further shows, that in the year 1825, Madam widow Pierre Charles Mourain, residing in this parish, now in the kingdom of France, and represented here by her agent, Peter G. Mourain, Esq., residing in said parish, became the purchaser of the plantation and slaves thereto belonging, situated in this parish, on the river Mississippi, where the late Julien Poydras died, as it appears by the *procès verbal* of adjudication of the Court of Probates, and a notarial act made in accordance with the clauses of the will aforesaid.

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“Your petitioner further shows, that notwithstanding the above said clauses and conditions, the said widow Mourain, through her agent, has wrongfully advertised publicly for sale at public auction, the one-half of the said plantation, in three different parts, and forty-one or forty-two of the slaves which belong to the said plantation, and which according to public notice, are to be sold individually, and separated from the said plantation.

“Your petitioner further shows, that unless protected by the authority of this honorable court, the slaves aforesaid, in open and unjust violation of the conditions subscribed to by the said widow Mourain, in the *procès verbal* of adjudication, and the notarial bill of sale aforesaid, shall be to their great prejudice, separated from the plantation aforesaid, and from each other, contrary to the will of the said Julien Poydras, and thereby his benevolent and humane intentions be defeated, to the great injury of the aforesaid slaves.

“Wherefore your petitioner, in his aforesaid quality, and with the view of protecting the aforesaid slaves, prays for an injunction to restrain the defendant from proceeding in said sale.”

The defendant pleaded an exception to the plaintiff's capacity and right to sue in this case.

She also pleaded to the merits, and denied that the plaintiff or the slaves themselves had any right to sue and maintain this action. She avers, that she had a right to sell the

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plantation and slaves as she was about to do; that the will of the late Julien Poydras, relative to his lands and slaves, has been already decided upon and determined by the Supreme Court, in the case *Moosa vs. Allain*, 4 *Martin, N. S.*, 99, in which the plaintiff was either a party or interested therein, and that the decision is in favor of the right of the owners of the slaves, to sell them separately from the plantation. She prays that the plaintiff's petition be rejected, &c.

The district judge who presided, overruled the exception, and maintained the right in the plaintiff to sue. On the merits, judgment was rendered in favor of the plaintiff, and the injunction was made perpetual. The defendant appealed.

L. Janin, for the plaintiff.

Mazureau, on the same side.

1. It will be seen by reference to the record, that both the defendant and plaintiff are heirs of Julien Poydras; that both of them are parties to the sale under which the defendant purchased the plantation and slaves in question, and that the plaintiff appears not only for himself, but as the attorney in fact of all the other co-heirs.

2. The deed of sale under which the defendant purchased, refers to the will of the ancestor, and incorporates its provisions, terms and conditions in relation to the slaves, which are accepted and promised to be performed by the purchaser.

3. The plaintiff sues as heir of the late Julien Poydras, and claims the right to have his last will and testament executed. He is one of those to whom the succession belonged in virtue of said will, and has an interest and right to have the will carried into effect.

4. The plaintiff, in his own behalf and for his co-heirs, has a direct interest in this matter, for being sold under the conditions of the will, the succession of their ancestor brought a much less price than it otherwise would.

5. The plaintiff would have had a right to institute this suit, if he were a total stranger. The testator, in his will,

calls on all persons in the name of humanity, and particularly the officers of the state, to see that his will is executed.

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6. The testator had a right to dispose of his slaves as he did. There is nothing in the provisions of his will, or the terms and conditions of the sale of the slaves under it, which derogates from the force of laws, made for the preservation of public order and good morals, nor any thing required in contravention of prohibitory laws.

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7. The case of *Moosa vs. Allain*, cited by the defendant, in support of the right to sell the slaves separately, has no application to this case. Whatever might have been the rights of the slave who was plaintiff in that case, the positive provisions of the will, and the contract of sale, must be enforced in the present case.

8. It has been contended, that by the Roman law, slaves could not be attached to the soil, and the Code of Justinian, book 11, title 47, was cited in support of this position. It proves the very reverse of the proposition. See *2d law of the 47th title*. The 7th law of the same title, contains an express prohibition to separate slaves from the lands to which they are attached.

9. It is further added, that every thing which restricts the right of property, must be strictly construed. What does this new principle apply to? Had not Mr. Poydras, and his heirs after him, the right of disposing of their property as they pleased? They had the right to free all the slaves, as soon as the laws would permit, and provide for their future condition.

Mitchell, for the defendant.

Two questions are presented in this case :

1st. Can the slaves, either by Poydras, or in their own names, stand in judgment in this form of action?

2d. Supposing they have a right to be heard, does the dispositions of the will of the late Mr. Poydras, authorise this court to pronounce such a judgment as the plaintiff asks?

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I. As it is not pretended, that the individuals for whose alleged benefit this suit is instituted, claim to appear as freemen, I shall take the most favorable supposition the case admits, and look upon them as *statu liberi*.

The *statu liber* has no positive unconditional right, but rather an expectancy, entirely conditional, and eventual. He may never arrive at the age required by law for his emancipation.

If we except his right to stand in judgment, when the period arrives at which he may claim his freedom, a limited, and recently granted right of inheriting and having the property bequeathed, preserved by a curator, and perhaps his right to apply for the aid of the courts, if an attempt be made to remove him from the state, before the period at which he may claim his freedom, he differs in nothing from the slave. Like him he is subject to the will and control of his master. If the *statu liber* commit an offence, the master is liable, the same as the master of the slave; and I am by no means prepared to admit, that the eventual freeman would not forfeit his claim by the commission of a crime, even though it were not of a heinous grade.

Slaves for a time a *statu liberi*, are those who have acquired the right of being free at a time to come, or on a condition which is not fulfilled, or on a certain event which has not happened, but who in the mean time remain in a state of slavery. *Louisiana Code, art. 37.* In this situation they have no right to appear in court, except when the privilege is expressly granted them by law. *7 Martin, N. S. 350.*

Having shown that a *statu liber* has no right that can authorise him to appear in this action, if a slave for life could not appear, I will now inquire how far the court is authorised to sit and listen to a slave, setting up such or similar pretensions.

If a testator had directed by his will, that the future masters of his slaves should not punish them, and that in case such masters should chastise a slave, the slave should thereupon be entitled to his freedom, could the slave be heard in court, to support his pretensions? I think not.

If he had appointed the hours of work and rest for the slaves, could the slaves have the aid of the courts? I think not.

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If he had directed that such slaves as he might own at his death, should be sold with his plantations, and that neither they nor their offspring should ever be separated, by the future owners, from the lands or plantations, and that said slaves were by the will authorised to stand in judgment, and claim the aid of the courts to enforce the disposition of the will, would such disposition avail and enable the slaves to sue? I think not.

If the testator bequeathed twenty-five dollars a year to certain slaves, can they appear in court to claim the bequest? I think not. It may be a natural, or moral, but it is not a legal obligation, which they can enforce in a court of justice. *Louisiana Code, art. 1751.*

No slaves shall be parties to a suit in civil matters, either as plaintiffs or defendants. *Acts of 1806, page 158, sec. 16.*

He (the slave) cannot be a party in any civil action, either as plaintiff or defendant, except when he has to claim or prove his freedom. *Civil Code, page 40, art. 18.*

A slave is one who is in the power of his master, and who belongs to him in such a manner, that the master may sell him, dispose of his person, his industry, and his labor, and who can do nothing, possess nothing, nor acquire any thing, but what must belong to his master. *Civil Code, page 10, art. 13.*

The rules prescribing the police and conduct to be observed with respect to slaves, in this state, and the punishment of their crimes and offences, are fixed by special laws of the legislature. *Louisiana Code, art. 172.*

The slave is entirely subject to the will of his master, who may correct and chastise him, though not with unusual rigor, or so as to maim or mutilate him, or to expose him to the danger of the loss of life, or to cause his death. *Ibid., 173.*

He (the slave) cannot be a party to any civil action, either as plaintiff or defendant, except when he has to claim or prove his freedom. *Ibid., 177.*

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Slaves cannot sue, either as plaintiffs or defendants, except as relates to their freedom. *Code of Practice, art. 103.*

Individuals cannot by their conventions, derogate from the force of laws made for the preservation of public order, or good morals. *Louisiana Code, art. 11.*

Whatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed. *Ibid., art. 12.*

I presume it cannot be denied, that the slave could not appear in court, to enforce the disposition of a will, directing he should always remain on a certain plantation; and it appears to me equally clear, that a *statu liber* cannot.

II. This question has been already decided by this court, in the case of *Moose vs. Allain*, reported 4 *Martin, N. S.* 99.

If the will of the testator was, that the slaves were never to be removed from the plantations, it must be found in its dispositions. I confess I cannot find it in the words, the expression of the will, now contended for.

In the first branch, the testator directs the manner in which his property shall be sold; that is, a plantation and the slaves attached to it, together. He says: "the sale of my plantations, as respects the slaves of both sexes belonging to me, and held by me, and all my slaves are to be looked upon as attached to one of them, shall be announced to be made," &c. He then, in the next disposition, directs, that the sales shall be made with the obligation, which the purchasers shall contract, or enter into, to free the slaves, which shall be sold with the plantations, after an uninterrupted enjoyment of twenty-five years from the date of the sale.

A subsequent clause of the will, which I shall presently consider, directs what is to be done (still, I understand, at the expiration of twenty-five years) with those slaves, who have evidently attained the age of sixty years.

Now, to my apprehension, the words of the will just quoted, are perfectly plain: the services of all the slaves, where the owner pleases, are to be uninterruptedly enjoyed, during twenty-five years.

Nay, more, I avow myself unable to discover that the disposition of the will, as quoted by the gentleman in his petition, differs in any manner from my understanding of it.

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The district judge, who delivered an opinion in this case, gave to the will a construction, totally different from what I can find the instrument to authorise. I trust I will not be deemed invidious, if I take a brief review of his opinion. Be this as it may, I believe it my duty to do so, and I shall not evade it.

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Madam Mourain in her answer, uses the following words :
“Neither Benjamin Poydras de Lalande, as protector, &c., nor the slaves themselves, have any right to maintain this action.” Yet the judge says : “It is not pretended that the dispositions of the will, with reference to the slaves, contain any thing, either against the positive laws of the land, or *contra bonos mores*.”

The other clause of the will which I have undertaken to examine, is in the following words :

“Comme aussi les dits acquéreurs de ces mêmes habitations pour eux ou leurs héritiers ou ayans-cause, s’obligeront de soigner et traiter avec humanité, et de conserver sur ces mêmes habitations, sans obligation de travail, tous les esclaves de l’un et de l’autre sexe faisant partie de ceux qu’ils auront acquis de ma succession, et qui auront atteint avec evidence l’âge de soixante ans,” &c.

This may possibly be looked upon as a kind of emancipation of such slaves as at the expiration of twenty-five years from the sale, should evidently have attained the age of sixty years.

It is believed that nature emancipates most slaves, or at any rate deprives them of the capacity of doing much labor, at the age of sixty years. The master, therefore, will be bound by the duties of humanity, as he is by the law, to support them without work. Even when a slave has been emancipated, and becomes infirm from old age or otherwise, the law has made it the duty of the late master, to provide for him. *Acts of 1806, pages 150, 152, sections 2, 3 and 4. Acts of 1807, page 86, section 5.* The will of Mr. Poydras,

EASTERN DIST. therefore, directs little more for this class of slaves, than is
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It appears to me I have shown,

1. That the individuals, on whose behalf it is alleged this suit is instituted, have no right to stand in judgment ; and,

2. That the only fair construction which can be given to the will of the late Mr. Poydras, is that none of its dispositions, by which he contemplated the amelioration of the situation of his slaves, were by him directed to take place before the expiration of twenty-five years from the day of the sale of his estate.

Martin J., delivered the opinion of the court.

The will of the late Julien Poydras, of the parish of Pointe Coupée, directs that all his slaves at his death, are to be considered as attached to his several plantations, on which they had been and were employed, and that his executors be required to sell them with, and as attached to the plantations on which they were situated, the vendee to come under the further obligation of freeing them at a certain period, and that the slaves thus emancipated, who may evidently be of the age of sixty years and upwards, have the immunity or privilege of remaining thereon, and to be supported without labor being required from them, with an annual stipend in money also allowed, &c.

The defendant purchased from the executors, one of the plantations of the deceased, with a large number of slaves attached thereto, and by the terms expressed in the act of sale, subscribed to the conditions imposed by the will.

In contempt of the obligation thus contracted, the defendant attempted to sell forty-two of those slaves, separately and apart from the plantation. The executors of the late J. Poydras having been discharged from their trust, and being *functi officii*, the present suit was instituted by the plaintiff as one of the heirs of the testator, who in that capacity sought to have the will carried into effect, by compelling a compliance with its provisions, and the strict performance of

the contract and sale made under it. He obtained a provisional injunction in the first instance, to stay the sale the defendant was about to make, of the slaves in question.

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The defendant excepted to the capacity and right of the plaintiff, to sue and maintain this action. The exception was, however, overruled by the judge presiding, and an answer put in to the merits, in which the defendant asserted her right to sell the slaves, separately and apart from the plantation, alleging that the terms and conditions of the will, which were sought to be specifically enforced, were null and void. The injunction was made perpetual, and the defendant appealed.

An exception to the present plaintiff's capacity to institute a suit of this kind, was pleaded in another case, relating to a number of these slaves, under the will of the late Julien Poydras, and sustained by the judge of the district, then presiding. On appeal, this court reversed the decision of the judge *a quo*, overruled the exception, and maintained the plaintiff's right of action. See *case of Poydras vs. Taylor, just decided, ante. 488.*

The heir who succeeds to the rights of his ancestor, may, after the executors are discharged, enforce the provisions of the ancestor's will, and see that his intentions are carried into effect against purchasers; although the heir has no other interest in the matter.

The plaintiff, after stating his heirship, declares he acts as the protector of the humble beings, who, like himself, were the objects of his ancestor's benevolence.

It was urged with much zeal, in the argument at the bar, that neither the slaves nor any person for them, could stand in judgment to prevent their being sold. In the case of the present plaintiff against Taylor, just decided, and referred to above, this court was of opinion, that after the executors were discharged, the heir had an undoubted right, as having succeeded to all the rights and actions of the ancestor, to require the specific performance of the terms and conditions of a sale of part of the estate, made by the executors, or to demand damages for its non-performance, or to claim its rescission for a breach of its terms and conditions; that this right of the plaintiff was not impaired by an avowal that his object was to see the will of his ancestor rigorously complied with.

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We have no reason to be dissatisfied with the opinion we then expressed, and conclude that the first judge did not err in overruling the exception in this case.

On the merits, the defendant claims the right to sell these slaves singly, separately and apart from the plantation, under the authority of an adjudged case, *Moosa vs. Allain*, 4 *Martin*, N. S., 99.

This was the case of one of the slaves of the late Julien Poydras, who complained of his removal from the plantation to which he was attached, and with which he had been sold at the sale of the estate. This court then expressed the opinion that the will secured to the plaintiff the faculty of staying and being supported on the plantation to which he belonged, and to be emancipated on arriving at the age of sixty years ; but that the purchaser of these slaves had, until their emancipation, the right to their labor wherever he chooses to require it.

The right of the purchaser in that case, was considered merely in regard to the then plaintiff, who was himself a slave. He could vindicate no right in a court of justice, except his claim to freedom, or some matter relating thereto. The rights of the purchaser in that case, who had the slave in possession, in relation to his vendor or any person exercising the rights of his vendor, were not considered ; they could not be in that case.

Admitting that the present plaintiff could not successfully complain and interfere, if the defendant in the present case employed the slaves in question off the plantation with which they were sold, and to which they were attached, it would not necessarily follow that he could not resist the defendant's attempt to sell them singly, separately and apart from the plantation. Such a sale would detach them from the plantation, to which the will and the sale made in conformity to it, by the executor of the testator and the ancestor of the plaintiff, require they should remain and continue attached. As long as the defendant, who is the vendee of the executors under the will, continues to be the owner of

both the plantation and the slaves, the exercise of the plaintiff's right to have the condition of the sale specifically performed or executed, remains unimpaired; but if the defendant sells the plantation to three several owners, and the forty-two slaves thereon to as many others, then the exercise of the plaintiff's right in requiring the provisions of the will to be carried into execution, will become extremely difficult, burdensome and precarious.

The defendant will no longer have it in her power specifically to comply with the conditions of the sale. The obligation to support the old emancipated negroes will not attach on the vendees of the land as a servitude. It is a servitude which is essentially due to an estate.

The vendees of the slaves, without notice, will be under no obligation to comply with the terms and conditions of the sale under which their vendor acquired them.

The exercise of the right of the plaintiff, will then be so burdensome, difficult and precarious that the right itself will become almost worthless.

Justice requires that the defendant should not be permitted to disregard the obligation she has solemnly contracted.

But it is urged that the terms and conditions of the will, which are now sought to be enforced, are null and void, as destructive of the absolute power which sound policy and the laws of the land require the master should exercise over his slaves.

So far as regards the slaves, the power of the master is indeed absolute. The slave cannot resist, or be heard if he complain of the abuse of this power; but in relation to other persons, nothing prevents the master from being compelled or coerced to comply with his engagements as vendee, which he contracted when he acquired his slave.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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So, where the testator provided in his will, that his slaves, after his death, should be kept on and attached to the plantations on which they were employed, and that the purchaser should be required to set them free after twenty-five years and emancipate and support, without labor, and give an annual stipend to such as were sixty years old, &c.: *Held*, that the purchaser could not alienate such slaves, apart from the plantation, and was bound to comply with the conditions and provisions of the will.

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BOISDERE AND
GOULE, f. p. c.
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BOISDERE & GOULE, f. p. c. vs. CITIZENS' BANK.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where stockholders have subscribed and complied with all the requirements of the charter, they are thereby entitled to all the rights of stockholders, which cannot be divested by amendatory acts of the legislature, accepted only by the president and directors of the institution.

The acceptance of an amended charter by the president and directors, which excludes a class of stockholders who are colored persons, when the original charter gives no authority to the board to obtain such a modification, does not operate a forfeiture of their stock, or divest them of their rights as stockholders.

If an act amendatory of the original charter of a bank, involves the destruction of a vested right, or impairs an obligation, it will be declared to be unconstitutional and void.

This is an action in which the plaintiffs, who are free people of color, claim the right and privilege of being stockholders in the "Citizens' Bank of Louisiana."

The rights and privileges claimed by the plaintiffs, are denied by the bank, on the ground, that by a *proviso* to an act, amendatory of the original charter, passed the 30th January, 1836, it is provided "*that no person or persons who are not free white citizens of the United States, and domiciliated in the state of Louisiana, shall be, either directly or indirectly, owner of any part of the capital stock of said company.*"

That the plaintiffs being persons of color were expressly excluded by the provisions of the amendatory act above referred to; and that no section or clause of said act should go into operation, until the whole was accepted.

The defendants submit to the court, whether, under the provisions of this act, they can extend to the plaintiffs the rights, provisions and immunities of stockholders in said bank?

The facts and evidence of the case show, that the Citizens' Bank of Louisiana, was incorporated by legislative act, dated the 1st April, 1833. The third section describes who may become subscribers, viz: "all persons who shall be in good faith the owners and possessors of real property within this state." Under this section the plaintiffs, who are free persons of color, were permitted to subscribe, one for two hundred shares, or twenty thousand dollars, and the other for one hundred and fifty shares, or fifteen thousand dollars, to secure which, according to the provisions of the charter, they both mortgaged large property situated in the state, in August and September, 1834.

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In 1836, to enable the bank to procure its capital stock, the legislature passed the amendatory act, pledging the faith of the state as security for the loan of the bank capital; and at the same time, provide in section third, "that for the guarantee of the bonds to be emitted by the state, in favor of the Citizens' Bank, &c., and for which the state pledges its faith, *all the securities granted by the act of incorporation of said bank, and especially by the third and fourth sections of said act, to the holders of its bonds, are hereby transferred to the state, &c.*"

On this evidence the cause was submitted to the district judge, who decided that the plaintiffs should be recognized and admitted to be stockholders of the Citizens' Bank. Judgment being in favor of the plaintiffs, the defendants appealed.

Benjamin and Roselius, for the plaintiffs.

1. It is admitted by the pleadings and statement of facts, that the plaintiffs possessed all the qualities required by the third section of the original charter, for becoming stockholders, that they complied with all the requisitions of the original charter, and were actually stockholders in the bank, when the law of 30th January, 1836, was passed, by which the charter of the bank was amended. They were consequently parties to a *contract*, their interest in which could not be affected by any subsequent law of the legislature.

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2. The eighth section of the amended act of 1836, contains no forfeiture of these rights and interests, nor does it : 1st. Because the words are in the future ; 2d. Because the French text can admit of none but a future or prospective construction, even if the English were doubtful ; 3d. Because even if the construction were doubtful, the general rule is, that laws cannot have a retroactive effect ; 4th. Because even if the legislature had the power to destroy vested rights, courts can never suppose their intention to be such, unless expressed in such language as to admit of no doubt ; 5th. Because the clause on which defendants rely, is inserted immediately after those provisions which treat of the new subscriptions.

3. The amendments have never been accepted by the stockholders, and although the president and directors are the agents of the stockholders for administering their affairs, it can never be maintained, that these agents have the power of making such contracts, as will totally destroy the rights of their constituents, and abandon their property without any consideration whatever.

Morphy, for the defendants.

1. The proviso contained in the eighth section of the amendments to the original charter, excludes plaintiffs, in as much as it provides that they shall not be owners of *any part* of the capital stock of the Citizens' Bank.

2. The amendments have been accepted in the only way in which they could be accepted, *i. e.* by the president and directors of the bank, as required by the law, making these amendments.

3. The plaintiffs cannot contend, that the amendments have not been properly accepted, when they claim a participation in the privileges and benefits resulting from said amendments, without which the charter would have been a dead letter up to this day, and the stock merely nominal.

4. The legislature have the right to dissolve or modify a corporation legally established, when they deem it necessary or convenient to the public interest. *La. Code, article 438.*

Bullard, J., delivered the opinion of the court.

The plaintiffs, f. p. c., allege that they were original subscribers and stockholders of the Citizens' Bank of Louisiana; that they executed their mortgages, which were duly accepted, in conformity with the charter, and they thereby became entitled to all the advantages, privileges and immunities conferred by the charter on stockholders; but they complain that the president and directors refuse to consider them as stockholders, or to allow them to act as such, or to dispose of their stock, or to accord to them the privileges to which they are entitled.

The defendants admit all the facts and allegations set forth in the petition, but aver, that when the faith of the state was pledged for the security of the capital of said bank, it was expressly provided, that no person or persons, not being a free white citizen of the United States, and domiciliated in the state, should be directly or indirectly owner of any part of the capital stock of the company, and that no part, sentence or clause of the act granting the faith of the state, should go into operation, until the whole should be accepted. They therefore submit the question, whether they can extend to the plaintiffs, who are free persons of color, the rights, privileges and immunities of stockholders, without a violation of the express conditions under which the faith of the state was granted.

It appears to us clear, that previously to the act of the legislature, amendatory of the charter, and pledging the faith of the state, the plaintiffs had fully complied with all the requirements of law, to constitute them stockholders. They were thereby entitled to all the rights of stockholders; they might sell their stock or pledge it for a loan, according to the provisions of the charter. Their right was fully vested. But it has been argued that until the money was procured, in consequence of the pledge of the faith of the state, the right of the plaintiffs was nominal, and could not be enjoyed, and that the legislature had a right to impose such conditions as it thought proper, and that the condition contained in the last act, does not violate a vested right. A right may

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exist, although its free enjoyment may be suspended or impeded. If the plaintiffs have forfeited or lost their privileges as stockholders, it must be either by their own acts or consent, or by operation of law.

The acceptance of the amended charter by the president and directors, cannot be considered as producing that effect, because by the charter, no authority is given to the board to obtain such a modification as to exclude a part of the original stockholders; and it does not appear that the charter, as amended, has ever been submitted to the stockholders. We are, therefore, of opinion, that the plaintiffs have not by their consent, lost their privilege.

It only remains to inquire, whether the act of the legislature amending the charter, and pledging the faith of the state, ought to be so construed as to operate the disfranchisement of the plaintiffs. That act first declares, that in order to facilitate the Citizens' Bank in the negotiation of the loan of twelve millions, the faith of the state is pledged for the security of said sum, and it provides for issuing the bonds of the state. The third section declares, that "for the guarantee of the bonds, to be emitted by the state, in favor of the Citizens' Bank, and of the interest thereof, and for which the state pledges its faith, all the securities granted by the act of incorporation of said bank, and especially by the third and fourth sections of said act to the holders of its bonds, are hereby transferred to the state, and the holders of the bonds which may be issued in virtue of this act." The securities here spoken of, as provided by the third and fourth sections of the original charter, are the mortgages given by the stockholders; so that the mortgages given by the plaintiffs, among other stockholders, are declared to accrue to the benefit of the state, and of the holders of its bonds; and form in fact a part of the security upon which the loan is to be obtained from foreign capitalists.

The eighth section of the amendatory act, provides for opening books of subscription to complete the capital stock, and a proviso to that section has created the present controversy. That proviso is in the following words, "that no

person or persons, who are not free white citizens of the United States, and domiciliated in the state of Louisiana, shall be either directly or indirectly owners of any part of the capital stock of said company."

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If this clause be susceptible of two interpretations, we consider ourselves bound to give it that which would not involve the destruction of a vested right, the impairing of an obligation, because if such were its clear import, we should be compelled to say that it is unconstitutional, and void. That the legislature did not intend to destroy any of the mortgages previously given by subscribers, is quite clear, because they are declared to accrue to the benefit of the state, and to the holders of its bonds, as a security for the reimbursement of the loan. No exception is made of those mortgages given by persons not white, and not citizens of the United States. It would lead to great inconsistency to suppose, that the legislature intended at the same time to annul acts of mortgage, which they accept as a consideration upon which the bonds of the state are issued, and which by the same act, are held out as inducements to capitalists to loan the capital stock. The words of the proviso are prospective, and refer to the future. The only doubt arises from using the words, "*shall be*," instead of *shall become* "*deviendra*," as is employed in the French text. But according to the best lexicographers, the words *to be*, is some times used as synonymous with, *to become*, "*to be made to be*," and the example given is, "and they twain *shall be* one flesh," in the old English translation of the bible. Taken in this sense, we may fairly conclude, that the legislature only intended to provide, that hereafter none but free white citizens shall become stockholders, either by subscription, under that section of the act, or by a transfer of existing stock, leaving the rights of all who were at that time stockholders unimpaired. It follows as a necessary consequence, that the president and directors, by a negotiation of the rights of the plaintiffs, would not violate any condition upon which the faith of the state has been pledged; for we cannot consider the legislature as having required or imposed a condi-

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tion constitutionally and legally impossible, that of annihilating the acquired and vested rights of the plaintiffs, without their consent.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The force and effect to be given to instruments, which have for *signatures* only the ordinary *marks* of the parties to them, depend more upon rules of evidence than the *dicta* of law relating to the validity of contracts required to be made in writing.

The genuineness of instruments under private signature, depends on proof; and in all cases when they are established by legal evidence, instruments *signed by the ordinary mark* of a person incapable of writing his name, ought to be held as written evidence.

The rules of evidence by which courts of justice in this state have been governed, since the change of government, have been borrowed in a great part from the English law, as having a more solid foundation in reason and common sense.

According to the rules of evidence as adopted in this state, the ordinary mark of a party to a contract, places the evidence of it on a footing with all private *instruments in writing*.

The general rule is, that proof of the signatures of the witnesses to an instrument of writing *under private signature*, when they are dead or absent, does not establish *that* of the obligor or principal.

Proof of the genuineness of an instrument under private signature, signed by the party making her ordinary mark or cross, and attested by two

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witnesses, may be made by parole evidence, after the witnesses and party are dead, by proving the witnesses' signatures, and that they were respectable and of good character, who would not attest a forgery. EASTERN DIST.
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The party who puts the *initials* of his name, gives a kind of approbation to the instrument on which he writes them, and is binding on him. This is not materially different from an *ordinary mark*.

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This is an action instituted by the executor and brother of Marie Louise Tagiasco, f. w. c., deceased, to recover a lot of ground with its improvements, in the city of New-Orleans, which the said Marie Louise and Jean Tagiasco, f. p. c., inherited from their deceased mother, Louise Baptiste Roux.

The facts and pleadings of this case are accurately and fully stated in the following judgment, rendered by the parish judge.

“ The plaintiffs, as heirs of the late Marie Louise Roux, a free woman of color, claim from the defendants, as heirs of the late Antoine Molinari, the possession of a certain lot and buildings thereon, situate in Dauphin, between St. Peter and Toulouse streets, which they allege were sold on the 24th of December, 1816, by the said Antoine Molinari to the said Marie Louise Roux, for the sum of three thousand dollars cash, he, the vendor, Antoine Molinari, reserving to himself the usufruct and possession of the property thus sold during his lifetime; the said plaintiff further alleging that the said Antoine Molinari, died on the 22d of November, 1833, and that the defendants, having been duly called upon to give up to them the possession of said property, the rent of which they state at forty dollars per month, have refused so to do, further pray that the said defendants be condemned to pay to them the rent of said property, at the rate of forty dollars per month, from the said 22d day of November, 1833, until the day of delivery.

“ The defendants, in their answer, after denying generally all the facts and allegations of the plaintiffs, except those specially admitted, recognize that there was an act of sale of the property claimed by plaintiffs, passed before Cristoval De Armas, notary public of New-Orleans, but they allege that the said sale was feigned and simulated, and calculated

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to cover a donation prohibited by the laws of the state, and refer to a counter letter bearing the same date as the deed relied on by the plaintiffs. The defendants further allege, that Marie Louise Roux, f. w. c., under whom the plaintiffs claim, lived in open concubinage with Antoine Molinari at the time the alleged deed of sale was made and the counter letter given.

“The plaintiffs, in support of their claim, introduced an act of sale of the property claimed by them, passed before Cristoval De Armas, then a notary public of New-Orleans, on the 24th of December, 1816, and they introduced testimony to show that Molinari died about the 20th or 22d of November, 1833, and that the property claimed rents from forty to fifty dollars per month.

“The defendants introduced in evidence a certain paper or document, at the bottom of which is to be found a cross (X) with the words “*marque ordinaire*” of Marie Louise Roux, and the *signatures of two witnesses*, J. Anglade and Phillippe Pajeaud. That paper contains a declaration from Marie Louise Roux, made in presence of the two said witnesses, that the act of sale of certain property, situated in this city, in Dauphin, between St. Peter and Toulouse streets, to her made by Antoine Molinari, before Cristoval De Armas, notary public, under the same date as the declaration, to wit: the 24th of December, 1816, is purely confidential and simulated; that the three thousand dollars, which by said act appear to have been paid in cash, in presence of the notary, were funds which Molinari himself had the very same day lent to Marie Louise Roux, in order that they might be represented before the notary, and thereby an appearance of truth and authenticity might be given to the sale, when in reality the act was only intended to cover a legacy of the property which Molinari wished to make of the same to the said Marie Louise and to her heirs after her death.

“The defendants, moreover, introduced several witnesses, who recognized the signatures of J. Anglade and Phillippe Pajeaud, the two attesting witnesses at the foot of the above mentioned document, and declared that the said J. Anglade

and Phillippe Pajeaud are dead, and that they were perfectly honest men; they also proved by testimony that Marie Louise Roux lived in open concubinage with Antoine Molinari at the date of the act of sale. They further proved, by two notaries of New-Orleans, that it has been a long standing usage and custom before and since the new Code, to receive acts under private signature, in presence of two witnesses, though they bear no other signature *than the ordinary mark of the parties.*

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“The court, after carefully examining the evidence, and hearing the arguments of counsel, considering,

“1. That under the laws, as in the opinion of the court they stood on the 24th of December, 1816, a person who could not write was not prohibited from passing an act under private signature, by making a mark instead of a signature, in presence of two witnesses.

“2d. That the usage and custom to pass such acts, appear to have been for a long time prevalent in this state.

“3d. That Marie Louise Roux, under whom the plaintiffs claim, lived in open concubinage with Antoine Molinari at the time the act of sale was passed.

“4. That the whole transaction presents nothing but an illegal donation, disguised under the form of a sale.

“It is, therefore, ordered, adjudged and decreed, that judgment be entered in favor of the defendants, and that the plaintiffs pay the costs.”

The plaintiffs appealed.

Morphy, for the plaintiffs and appellants.

1. In this case only the signatures of the witnesses to this pretended counter letter are proven. Proof of the signatures of the witnesses does not prove that of the obligor or principal. 7 *Martin, N. S.*, 58.

2. Under the Civil Code of 1808, the use of a cross or *marque ordinaire* of the party, was not permitted or authorised even in public acts passed before a notary. According to the Louisiana Code, a person unable to write may make a cross or his mark, but in public acts only. *Civil Code 307, arti-*

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3. No parole evidence can be admitted to prove any thing beyond or against the contents of a written instrument. *Civil Code, 345, article 2. 8 Martin, N. S., 542.*

4. Admitting the sale to be a disguised donation, it is valid; not being embraced by the prohibition concerning persons living in open concubinage. *Civil Code, 233, article 114, 115, 116. Loizeau, Traité des enfans naturels, 668. 11 Merlin's questions du droit, verbo donation, page 238, section 5.*

Pichot, for the defendants, contended that the judgment of the court below was correct, and should be affirmed.

J. Seghers, for plaintiffs.

1. The act relied on by the defendants is a nullity. Acts under private signature are required to be signed with the name of the party in his own hand writing. *Civil Code, 307, articles 222, 223. Ibid. 305, article 218. Louisiana Code, 2238, 2240, 2232. 8 Merlin's Repertoire, verbo signature.*

2. No parole evidence can be admitted against what is contained in an authentic act. *Civil Code, 311, article 241. Ibid. 345, article 2. Louisiana Code, 2255.*

3. The testimonial proof of the signatures of the two witnesses to the document relied on by the defendants, as a counter letter, is inadmissible, and should not have been received to prove the pretended signature or mark of the obligor. *Partida 3, title 18, law 114; and note 5 of Gregorio Lopez: Debe valer en vida de aquellos, &c.*

4. No party to a written contract, who had it in his power to obtain a counter letter, can be permitted to prove, by parole evidence, that the contract was simulated. *6 Martin, N. S., 206. 8 Ibid., N. S., 448. 4 Louisiana Reports, 169. Note 5, 8 Lopez.*

Mathews, J., delivered the opinion of the court.

This suit is brought by the plaintiffs, as heirs instituted by will, or universal legatees of a free woman of color, who was

named Marie Louise Roux. They claim a lot of ground and buildings thereon, and situated in Dauphin-street, between Toulouse and St. Peter, now in possession of the defendant, who holds it as natural tutrix of her minor children. She obtained judgment in the courts below, from which the plaintiffs appealed.

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The facts of the case are as follows: Antoine Molinari, late husband of the defendant, previous to his marriage with her, lived in a state of concubinage with the testatrix, Roux, who in the testament by which she institutes the plaintiffs as her heirs, recognizes them to be her natural children; during the period of the concubinage, as above stated, the paramour conveyed to his concubine the property now in dispute, by authentic act, reserving to himself the usufruct of it during his lifetime. After his death, it remained in possession of the defendant, as tutrix of her children, unmolested, until the institution of the present action, for whom she claims the property as heirs to their father. In support of this claim, and in opposition to the title set up on the part of the plaintiffs, a counter letter, signed with the ordinary mark of the pretended purchaser, from Molinari, the father, attested by two witnesses, was offered and admitted in evidence on the part of defendant. In this instrument, the concubine acknowledges that the deed to her was fictitious, and made without any valuable consideration given for the lot pretended to have been sold. The right of the plaintiffs to bring suit under the will of their ancestor cannot be disputed, although an exception to this effect is found in the record.

The decision of the case depends mainly on the propriety of the opinion of the judge *a quo* by which he admitted the counter letter in evidence, and the effect which that instrument must have on the claims of the parties, in pursuance of legal principles applicable to the subject. Its introduction was excepted to on various grounds: 1st. That an act under private signature is invalid, unless signed with the name of the party in his own hand writing; 2d. No parole evidence can be admitted against what is contained in an authentic act; 3d. The testimonial proof of the signature of the two wit-

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nesses to the pretended document cannot be admitted, and does not establish the signature or mark of the obligor; 4th. That parole evidence unaided by a counter letter is not admissible to prove the simulation of a contract. The second and fourth of those propositions are so clearly in conformity with the laws of the country and the decisions of its courts of judicature, that if they stood alone and were applicable to the circumstances of this case, they would fully support the exception. But an instrument purporting to be a counter letter was offered in evidence and received by the court below; the death, however, of the party to it, and of the subscribing witnesses, renders extremely difficult, proof of its genuineness and reality. Another question is raised as to the legal effect which acts under private signature have on contracts evidenced by them, when they are solemnized only by the ordinary mark of the party who knew not how to sign his name. Against the force of such instruments, as written evidence, although verified by witnesses, many authorities have been cited from the French jurisprudence, from the Spanish laws, and from the old Civil Code, the rules of which and the laws of Spain were in force in this state, at the time the contracts between Molinari and his concubine were entered into. We may at once admit that the doctrine maintained in France by the learned jurists of that kingdom, and the decisions of its tribunals of justice, prove the proposition assumed on the part of the plaintiff, viz: that acts *sous seing privé* evidenced by the *ordinary mark* of a party, in that country have not the force and effect of written evidence. This admission may be made without influence on the question now before the court, for the rules there established in relation to the celebration of contracts, and the evidence required to prove them, have not the force of law in this country. We will therefore look to the provisions of the Spanish law, and of the old Civil Code; and may, without a violation of any general principle of jurisprudence, turn our attention to what was customary and usual in this country, touching contracts and the evidence by which they were supportable, both while it was a colony of Spain, and since it was brought under the government of the United

States, particularly to what has been usual since the change of government. The Spanish law directing the manner in which contracts in relation to real property were to be made, has apparent contradictions in it. We there find a general provision that all contracts may be entered into either by parole or by writing; and there are other rules which seem to imply that all those which relate to immoveables were required to be passed before a notary public. By some of the decisions of this court, the general rule which seemed to authorise all kinds of contracts to be made by parole, under the influence of that law, has been adopted. Since the change of authority in this country there has been so much specific legislation, and was at the time when the contracts now under consideration were entered into, that the former laws may have been referred to mainly as a source from which sound legal precepts might be drawn, being based on the Roman civil law, which contains an inexhaustible fountain of sound legal reasoning. Let us turn then to the texts of the code of 1808. We there find that contracts for the alienation of immoveable property made under private signature, and attested by a competent number of witnesses, are recognized as valid between the parties and their successors. But it is contended that an ordinary mark of a person who does not know how to write his name, is no signature. If we go to the root of the word, we find that it means any sign, stamp or mark. (See *Webster's dictionary, verbo signature.*) Perhaps, however, according to the general intendment of law, it means a sign manual: that is, the name of a person written or subscribed by himself. But the force and effect to be given to instruments which have for signatures only the ordinary marks of parties, depend more on rules of evidence than general *dicta* of law, relative to the validity of contracts required to be made in writing. The fact of the counter letter adduced in the present instance having been made in writing, cannot be denied; yet its validity and genuineness depends on proof, and in all cases where these things are established by legal evidence, instruments signed by the ordinary mark of a person incapable of writing his name, ought to be held as written

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The genuineness of instruments under private signature, depends on proof. And in all cases, when they are established by legal evidence, instruments *signed by the ordinary mark* of a person incapable of writing his own name, ought to be held as written evidence.

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The rules of evidence by which courts of justice in this state have been governed, since the change of government, have been borrowed in a great part from the English law, as having a more solid foundation in reason and common sense.

According to the rules of evidence, as adopted in this state, the ordinary mark of a party to a contract, places the evidence of it on a footing with all private instruments in writing.

evidence, in the administration of justice, according to the rules of evidence by which the courts of this state have been governed ever since the country became an integral part of the United States. These rules have been borrowed in great part from the English law, as having a more solid foundation in common sense and reason than the systems of other civilized states relating to this subject. Now according to those rules, thus adopted, the ordinary mark of a party to a contract places the evidence of it on a footing with all private instruments in writing. The same rules authorise proof of the genuineness of instruments similar to the one now under consideration, by evidence such as has been adduced in the present case. These rules must yield to positive legislation contrary to them; but we find none such any where in our law. The code which governs in this case, contains no express provisions, contrary to the general rules of evidence, which has been adopted as above stated. As to what has been customary, we find testimony which goes to establish the fact, that writings under private signatures, have both before and since the adoption of the Civil Code, been received as written acts, when they have only the ordinary mark of the parties, if made before two witnesses. That this custom should have been common in this country, is not surprising, when we consider the great neglect of education which seems to have prevailed, while it was a colony of the Spanish government, and which, it is feared, yet too much prevails. If arguments *ab inconvenienti* may be allowed a place in this opinion, (and in support of such arguments, we have the authority of Lord Coke, who declares that *argumentum ab inconvenienti semper valet in legem*,) it is evident, that great inconvenience would result to many of our fellow citizens, if acts, such as the one now before us, should be denied the rank of written evidence. Some difficulty still remains, in respect to the manner in which proof was made of the counter-letter. The party to it and the witnesses are all dead. The sign or signature of the former could not be proven, in consequence of their being rarely any different and distinct characters in ordinary marks.

In the case of *Dismukes et al. vs. Musgrove*, 7 *Martin*, N. S., 58, this court entered largely into the consideration of the rules which prevail under the English jurisprudence and in several states of the Union, in relation to the evidence required to support an instrument under private signature, when the parties and witnesses were dead, or from any other cause the testimony of the latter could not be procured; and it was then held, that in such a case proof would be required of the signature of the party, as well as those of the witnesses. We still adhere to the doctrine then established, although, perhaps, the rule presented is more onerous than that of the common law. But when it becomes an absolute impossibility to prove the handwriting, or sign manual of the party to an instrument, in consequence of his inability to write, must it be treated as a nullity in the face of evidence, and circumstances which are sufficient to convince every honest and disinterested man, (who attends to the testimony) of its truth and genuineness? We think not. In the present case, the signature of both witnesses were fully proven, and that they were men of such honesty, and general uprightness of conduct, that they could not have been induced to lend their aid to a forgery. The circumstance of the mode of life of Molinari and his concubine, is such as to raise a presumption that the sale to the latter was fictitious. The price as stated in the pretended act of sale, was three thousand dollars, said to have been paid at the time of executing the deed. At the period when this transaction took place, it was much more difficult to raise money than at present; the country was then very deficient in capital, if compared to the present existing state of things. It appears to us, that it would require faith, unsupported by evidence, to believe that a person of the class, condition and conduct of the mother of the plaintiffs, had at any one time in her possession, or at her command, the sum of three thousand dollars. In the case of *Weis vs. Mainhaut*, 4 *Louisiana Reports*, 121, the initial letters of a party's name were held to be binding on him, and it appears to us that they do not

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MOLINARI'S
HEIRS.

The general rule is, that proof of the signatures of the witnesses to an instrument of writing under private signature, when they are dead or absent, does not establish that of the obligor or principal.

Proof of the genuineness of an instrument under private signature, signed by the party making her ordinary mark or cross, and attested by two witnesses, may be made by parole evidence, after the witnesses and party are dead, by proving the witnesses' signatures, and that they were respectable and of good character, who would not attest a forgery.

The party who puts the initials of his name, gives a kind of approbation to the instrument on which he writes them, and is binding on him. This is not materially different from an ordinary mark.

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differ very materially from an ordinary mark. From a careful examination of the evidence of this case, both express and circumstantial, we are of opinion that the act of sale from Molinari to his concubine, Roux, was fictitious, and intended to disguise a donation made to her, which could not legally be done.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

SLOO ET AL. VS. TARBE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The Supreme Court is made the judge of facts as well as law, and has to decide on the weight of testimony. Great respect is due to the verdict of a jury on facts, and it will not usually be disturbed. But when this court differs in opinion with the judge *a quo*, as to the weight of testimony in a case, his judgment will be reversed.

This is an action or an alleged verbal lease, to recover from the defendant the sum of eight hundred and fifty dollars, as the price of the rent of a store and warehouse, for about eleven months.

The defendant pleaded a general denial.

The plaintiffs' clerk, Layet, sworn, says he had several conversations with the defendant after the store was leased, and he was of *opinion* from these, the defendant had rented it.

Another clerk of plaintiffs, (Grivot) says he had several conversations with defendant about the store, and understood he had rented from the plaintiffs. On one occasion defend-

ant told witness, if plaintiffs did not make certain repairs or improvements, he would quit the store and not pay the rent. The defendant occupied the store.

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Cross-examined. Witness knew a Mr. Bowis, brother-in-law of defendant, who occupied the store with him, whom he considered a clerk to the latter. Sometime after this, Bowis left defendant and opened a liquor store for himself, in another place. Defendant continued to occupy the store of plaintiffs for some time after Bowis left him.

Another witness called on defendant for the keys of the store, after he ceased to occupy it, and received them at his house, from one of his servants.

Defendant's counsel read the testimony of *Bowis*. He states he occupied the store in question from December, 1833, to March, 1834; that he *rented* it himself from the plaintiffs at eight hundred and fifty dollars per annum. The house and pavement was not finished, and he left it; and refused to pay rent on account of its unfinished state. He further says, the defendant Tarbe was present when he rented it from the plaintiffs, but was not interested, and had only accompanied him as an interpreter and friend.

Another witness deposed that Bowis occupied the store in question; and his brother-in-law, the defendant, lived in the same store. Their business was separate. Tarbe refused to be security for Bowis.

Bell, a witness for defendant, says the house of Bell & Buchanan had goods on storage with Bowis, in 1834; and that the defendant, Tarbe, was a clerk in their house, and attended to the sales, storage and delivery of their goods. Does not know if he done any business on his own account, and thinks he could not have done much.

The defendant produced in evidence, two several accounts, made out by the plaintiffs for rent of the premises, in dispute at the time of this lease, which were both made out against Mr. Bowis, but not receipted.

Grirot again called, and examined to rebut the evidence of Bowis, states, that Bowis told him he left Tarbe in the hope of making more by himself. He never told witness he

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had rented the store of plaintiffs. Witness states it is customary, or not unusual for owners of houses to make out their bills against persons substituted by the lessee. That defendant in this case is a responsible man, and Bowis is not.

Moses Dillon, witness for plaintiffs, says, the defendant told him that he had rented the store of plaintiffs; the one, the rent of which, is now in controversy.

The district judge who tried the cause, was of opinion the plaintiffs had made out their case, and were entitled to recover against the defendant. Judgment was rendered accordingly, from which the defendant appealed.

Worthington, for the plaintiffs.

J. Slidell, contra.

Mathews, J., delivered the opinion of the court.

This action is founded on an alleged contract of lease, by which the plaintiffs state that they let to the defendant a certain house or store, for one year, at a specified sum for its use. They obtained judgment in the court below, from which the defendant appealed.

The Supreme Court is made the judge of facts as well as law, and has to decide on the weight of testimony. Great respect is due to the verdict of a jury on facts, and it will not usually be disturbed: but when this court differs in opinion with the judge *a quo* as to the weight of testimony in a case, his judgment will be reversed.

The decision of the case depends on matters of fact. The evidence is somewhat contradictory, and we, according to the manner in which this court is constituted, are bound to weigh the testimony in a cause, as well as the inferior courts. Great respect is due to the verdicts of juries as to facts, and their decisions in relation thereto are not usually disturbed, when the truth, as derived from witnesses, is doubtful, the facts being nearly balanced by the testimony.

The present case was submitted to the decision of the judge *a quo*, and however reluctantly, we are constrained to differ with him in opinion, as to the weight of testimony adduced in the cause. The evidence of the contract of lease relied on by the plaintiffs, consists entirely of proof of extra judicial confessions of the defendant, and they are not made very explicit by the witnesses. Opposed to this weak testimony, we have proof positive from a person who declares

unequivocally, that he leased the premises about which the present dispute arises, in his own name and for his individual use. It is true, we have it in evidence, that the defendant stored goods in the house, while occupied by the lessee, and that he held over for some months after the latter left the premises. In corroboration of his testimony, two accounts for rent, made out by the plaintiffs against him as lessee, are produced. From these facts, we conclude that no contract was ever made between them and the defendant, and consequently they have failed to support the allegations of their petition by proof. The defendant may, however, be liable to them on a *quantum valebat*, for the time which he continued to occupy the house after the lessee had abandoned it.

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DUPLANTIER.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, avoided and annulled; and it is further ordered, that this suit be dismissed at the costs of the plaintiffs, in both courts.

VIDAL'S HEIRS vs. DUPLANTIER.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

A last will and testament should first be admitted to probate, and ordered to be executed by some competent tribunal, at the place where the succession of the testator is opened, before it can be made the basis of a title or claim to property by those inheriting under it.

A certified copy from a copy of a Spanish record of the judicial proceedings and adjudication of property, ordered to be deposited and kept in the archives of the Spanish government at Baton Rouge, is legal and admissible evidence of the matters to which it relates. Only a copy of

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the judicial proceedings according to the practice of the Spanish government was kept, in relation to the administration of estates, when the property was situated in different jurisdictions.

This case was formerly before this court. The facts and evidence are fully stated in the report then made of it. See *7 Louisiana Reports, 37.*

After the first decision was pronounced in this case, it was discovered that the copy of the will of Vidal in the record was imperfect; the signatures of the testator and witnesses having been omitted. On showing to the court this imperfection, and on producing a true copy of the will with all the signatures to it in due form, a re-hearing was allowed.

D. Seghers and *Pichot*, argued for the plaintiff in the re-hearing.

A. N. Ogden, contra.

Bullard, J., delivered the opinion of the court.

In this case, which was decided at August term, 1834, (see *7 Louisiana Reports, 37.*) a re-hearing was allowed, on its being satisfactorily shown that a copy of the testament in the transcript was imperfect, and that in fact the testament was not signed by the testator and the witnesses. We have, therefore, re-considered the case upon other points made in the argument.

A last will and testament should first be admitted to probate, and ordered to be executed by some competent tribunal, at the place where the succession of the testator is opened, before it can be made the basis of a title or claim to property, by those inheriting under it.

It does not appear that the will of Vidal was ever ordered to be executed by any tribunal at the place where this succession was opened; on the contrary, it is shown that his estate was not administered as intestate, under the authority of a Spanish tribunal at Pensacola, while that place and Baton Rouge, where the land is situated, remained under the authority of Spain. In order to show that the land in question had been alienated by judicial authority to pay the debts of Vidal, the defendant offered in evidence a copy of a record remaining in the archives at Baton Rouge, certified by Governor de Grand Pré, from which it would appear that in pursuance of a decree rendered by the Governor at Pensa-

cola and transmitted to him, he had adjudicated the said land to the last and highest bidder. The defendants set up title under the purchaser at that sale or *remate*. Various objections were made to the introduction of the document in evidence, and the court having overruled them, a bill of exceptions was taken. These exceptions were : 1st, that the document is alleged to be, and so appears on its face, a copy of a copy, and not the best evidence ; 2d, that it is not legal evidence of a decree recited by it for the sale of Vidal's lands ; 3d, that it is not legal evidence of the meeting therein recited, nor of the proceedings of such meeting ; 4th, that it does not correspond with the allegations in the answer which refers to an original decree for the sale of the lands.

The document, or rather documents in the record, bear various certificates, signed by Carlos de Grand Pré. One of them, which is annexed to a copy of a decree, is in the following form : " Es conforme al despacho original que se ha recibido ultimamente de la plaza de Panzacola y diligencias practicadas en su consecuencia hasta el dia de hoy." The proceedings which took place in pursuance of this *despacho*, remained a matter of record at Baton Rouge, and among others, the final judgment of *remate* or adjudication of the law. It appears from another certificate, that the original proceedings were remitted to Pensacola, a *testimonio* of them being ordered to be kept in the archives at Baton Rouge. The copy is, therefore, a copy of a record in a judicial proceeding, and was, in our opinion, properly received, it appearing to conform to the practice of the Spanish tribunals in relation to the administration of estates, when the property is situated in different jurisdictions. These proceedings show, that the land in dispute was sold by competent authority, to pay the debts of Vidal, the testator.

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A certified copy, from a copy of a Spanish record of the judicial proceedings and adjudication of property, ordered to be deposited and kept in the archives of the Spanish government, at Baton Rouge, is legal and admissible evidence of the matters to which it relates. Only a copy of the judicial proceedings, according to the practice of the Spanish government, was kept, in relation to the administration of estates, when the property was situated in different jurisdictions.

It is, therefore, ordered, adjudged and decreed, that the judgment first pronounced by this court remain undisturbed.

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HEIRS
vs.
BOWERS.

ROCHELLE'S HEIRS vs. BOWERS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In an action by the heirs of a surety in a paymaster's bond, against a co-surety, to compel him to contribute his proportion of the sum for which all the sureties were condemned *in solido*, by a judgment in the United States District Court: *Held*, that the record and judgment of said court was domestic, although not examinable in the state courts; and not being revised or reversed by the Supreme Court of the United States, was *res judicata*, and conclusive evidence against each and all of the parties as to all things adjudged by it, and admissible in evidence in this case.

This is an action by the heirs of the late R. L. Rochelle, against the defendant, George P. Bowers, to recover his proportion of the sum of seven thousand four hundred and fifty-six dollars, being the one-half of a judgment which the executors of the ancestor of the plaintiffs paid and satisfied to the United States; which had been obtained against both of them, as sureties in a paymaster's bond. The plaintiffs allege that by said payment, they, in right of their ancestor, became subrogated to the rights of the government of the United States against said Bowers, who, as co-surety, was bound for his proportion of said sum, amounting to one thousand four hundred and ninety-one dollars, with interest, for which they pray judgment.

The defendant pleaded a general denial, and denied specially that he ever signed the surety bond of paymaster Gibbs; and that no citation was ever served on him in the suit on said bond in the United States Court; consequently, he was no party to the bond or to the suit, &c.

On the trial, the plaintiff offered in evidence the record of the suit of the United States vs. Gibbs and his sureties, the defendant being one, which was disallowed by the court to go to the jury, because said suit and record was not legal

evidence of what it purported to establish. The court added, "there was no other evidence that Bowers was security to Gibbs than what appears in the judgment which is offered in proof of the plaintiffs' demand; and which evidence the court refused, because it does not appear that Bowers was a party to the judgment." The opinion of the court was excepted to. The plaintiff again offered the same record, which was objected to on the ground that service of citation appeared to be made on David Talcot, the commercial partner of defendant, and so alleged in the petition. To obviate this objection, the plaintiff offered to prove that the said David Talcot was the commercial partner of said Bowers, at the time of executing said bond and at the time of the service of process on said Talcot. This testimony was refused by the court, and a bill of exceptions taken. It was then agreed that the cause be tried before the Supreme Court, on the petition, answer and bills of exception. The plaintiffs took the appeal.

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HEIRS
VS.
BOWERS.

Carleton and Lockett, for plaintiffs.

Hennen, contra.

Mathews, J., delivered the opinion of the court.

This case comes up on bills of exception to the opinion of the judge *a quo*, in which he refused to admit in evidence the record of a judgment which had been obtained in the District Court of the United States, for the district of Louisiana, against the defendant; and a refusal to allow parole proof of the existence of a partnership between him and David Talcot, on whom service of citation was made in that suit. The trial was before a jury in the court below, and the evidence on which the plaintiffs based their action, being refused admittance, they, the jury, found a verdict for the defendant, on which judgment was rendered, and the plaintiffs appealed.

The reasons given for rejecting the record and judgment of the District Court of the United States, appear to us to

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In an action by the heirs of a surety in a paymaster's bond, against a co-surety, to compel him to contribute his proportion of the sum, for which all the sureties were condemned *in solido*, by a judgment in the United States District Court: *Held*, that the record and judgment of said court was domestic, although not examinable in the state courts; and not being revised or reversed by the Supreme Court of the United States, was *res judicata* and conclusive evidence against each and all of the parties, as to all things adjudged by it, and admissible in evidence in this case.

have no foundation in the rules of evidence established for the purpose of aiding in the administration of justice. Perhaps the facts offered to be proven by the plaintiffs, in relation to the service of citation, in that court, were not necessary to support the action of the plaintiffs; and this, from the view which we have taken of the case, we believe to be true. The suit in the court of the United States was brought by the government against several sureties for the faithful performance of the duties required of a paymaster employed by the proper authority of the United States, in relation to their armies. He proved to be a defaulter, and judgment was rendered against his sureties *in solido*; amongst them was the ancestor of the plaintiffs, who was compelled to pay the whole amount of defalcation; and they, as his heirs, bring the present suit, to recover from the defendant the amount for which he is legally responsible to his co-surety, as having paid the whole amount of the debt to the United States.

The judgment of the District Court of the United States is domestic, although not subject to revision or examination by any of the tribunals of the state in which it may have been pronounced. It could only have been reversed or affirmed on an appeal or writ of error to the Supreme Court of the federal government. The present defendant was condemned as surety *in solido* with others, to pay the damages which had accrued to the United States in consequence of the misconduct of the paymaster, their principal; and as to him and others who were parties to the proceedings which took place in the federal court, we consider the judgment there rendered as *res judicata*, and conclusive evidence against all and each one of them, as to all things which were adjudged by that court relating to the cause of which it clearly had jurisdiction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled; and it is further ordered, that the cause be sent

back to said court for a trial *de novo*, with instruction to the judge thereof not to reject the record and judgment of the District Court of the United States, offered in evidence by the plaintiffs; and that the defendant and appellee pay the costs of this appeal.

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vs.
GRAVIER'S
CURATOR.

M'DONOUGH vs. GRAVIER'S CURATOR.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

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Where the purchaser at a sale under execution shows a judgment, writ of execution, and sale to him under them, made by the proper officer, all previous proceedings by the latter are presumed to have been correctly made; that is, in relation to the formalities required by law. This presumption is *omnia recte acta*. But this, like all other presumptions, yields to contrary proof.

In forced alienations of property, all the formalities required by law, must be strictly fulfilled to give validity to the sale.

Persons having an interest to cause the alienation of property at sheriff's or other forced sale, to be annulled for want of the legal formalities in making it, may claim judicially the rescission of such sale.

In forced alienations, the property must be described with minuteness and accuracy, so that it can be appraised with such minuteness as to ascertain its value, and be sold together, or separately, to the best advantage.

So, where a sheriff seized property in execution, and described it as "*land lying between St. Paul and Bertrand-streets, in the city of New Orleans,*" and the evidence showed that the ground between these streets had previously been laid off into lots and squares: *Held*, that this description was insufficient, and that the sale under it gave no title to the purchaser.

According to the *article 702* of the *Code of Practice*, the sheriff is required to specify the object seized and sold, which must be done in the *return on his writ*, so as to distinguish and specify one object from another,

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Real or immoveable property, situated in New-Orleans, must be advertised in the newspapers in the English and French languages for thirty days, *excluding the day when the advertisement commenced, and the day of sale*, so that thirty clear days may elapse between. The want of this formality is a ground of nullity of the sale.

This is a petitory action. The plaintiff alleges, that he is the owner and proprietor of a large piece of property in the city of New-Orleans; and that about the 11th November 1834, the curator of the estate of the late John Gravier, obtained an order from the Court of Probates for the parish and city of New-Orleans, to sell said property in lots, according to a plan and advertisement published in the gazettes of the city; the sale to take place the 30th January, 1835.

The plaintiff further alleges that he purchased said property at sheriff's sale, made by George W. Morgan, sheriff of the parish of New-Orleans, as appears by the said sheriff's deed, dated 30th April, 1830. He further shows that the curator of Gravier's estate has placed said property in an inventory as belonging thereto, and obtained the aforesaid order of sale, to his great injury and damage one thousand dollars. He prays that the property be decreed to belong to him, and that he have judgment for his damages against the curator for the illegal disturbance of his right and possession thereof.

The defendant put in an answer and petition in reconvention, and denied that the plaintiff had any right or title to the property in question. He avers, that the sheriff's sale of April 30, 1830, which the plaintiff sets up as the basis of his title and claim to this property is null and void, as being defective both in form and substance, and as having been procured by the misrepresentations and other fraudulent means made use of by the plaintiff himself, by which he purchased for ninety dollars, property then worth eight thousand dollars. Various circumstances, facts and proceedings are then detailed to show the manner and circumstances under which the property in dispute had been sold, and its actual situation and value before and since the said sale. The answer concludes with a prayer that the sale of April 30,

1830, be cancelled and annulled; that the plaintiff be forever enjoined from asserting any title to the property; and that he pay Gravier's estate ten thousand dollars in damages, with costs of suit.

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The evidence and facts of this case show, that in April, 1824, judgment was rendered in the Probate Court for the parish and city of New-Orleans, against John Gravier and John Poumairat, as executors of B. Lafon, for twenty-two thousand and seventy-nine dollars. This judgment seems at first to have been considered *de bonis testatoris*, but was afterwards changed into a judgment *de bonis propriis*. Execution issued on this and several other judgments, of like character, when Gravier surrendered a number of squares and lots of ground, which he deemed sufficient to satisfy the demands against him. These squares and lots were laid down and described on a plan made by himself, which is in evidence in this case. It embraces thirty-two squares or lots of ground, in the faubourg St. Mary, and extends from between two streets running perpendicularly to the river, the upper called Hevia and the lower Common-street, and two other streets running parallel with the river, the one nearest to the river called St. Paul-street, and the one nearest to the swamp called Bolivar-street. A number of the lots and squares thus surrendered and designated on Gravier's plan, were sold under these executions; while others were reserved for the benefit of the proprietor, under various pretences. When the purchasers, and among them the present plaintiff, applied to be put in possession of their lots, it was found impracticable, owing to the incorrectness of the *plan* by which they were sold.

Under these circumstances and difficulties, it was agreed among the purchasers, at the suggestion of the city surveyor, to make a new plan, running the streets through towards the swamp, according to their proper direction, and to make up for the deficiency of lots which should be found to exist. The plan was extended back into the swamp, and one additional street annexed, called Bertrand-street. The addition of this street gave another tier or range of four more

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squares. Gravier, it seems, gave no positive assent to this alteration ; but after the new plan was made, he refused to join in and sanction it. The purchasers at the sheriff's sale of December, 1824, were left in much uncertainty as to their titles and boundaries.

The curator of Gravier's estate now alleges, that it was with a view of divesting Gravier of all his right, title and interest to the ground that belonged to him according to this new plan, that another execution was issued on the original judgment of 1824 against him. This execution issued the 6th June, 1829, returnable the first Monday of August, 1829. It was levied on all the right and title of Gravier to property within certain boundaries, embracing in part that included in the new plan. This execution was returned, "no sale for want of time." The execution under which the sale now in contest was made, issued the 13th March, 1830. On it, the sheriff made the following endorsement and return :

" Received, Saturday, the 13th March, 1830. Seized the right, title and interest of John Gravier to the lands lying between St. Paul and Bertrand-streets, in the city of New-Orleans, and sold on the *fifteenth of April*, 1830, to John M'Donough for the sum of.....\$90 00

Deduct costs of court and sheriff's fees..... 33 50

\$56 50

" Balance of fifty six-dollars and fifty cents paid to plaintiff as per receipt book. Returned 17th May, 1830.

G. W. MORGAN, Sheriff."

The sheriff's advertisement describing the property, and notifying the terms, conditions and time of the sale, is as follows :

" By virtue of a writ of *fieri facias*, to me directed, will be exposed for sale at the New Exchange Coffee House, corner of Chartres and St. Louis streets, on Monday, the 19th day of April next at one o'clock, P. M., the right and interest of

John Gravier, whatsoever the same may be to lands lying in the rear of suburb St. Mary, within the following bounds, to wit : in front, or to the east, by the line of St. Paul-street, in its whole length from Mr. Perilliat's line above, to Common-street below, on the upper side ; or to the south by Mr Perilliat's line, running back from its intersection with the said St. Paul-street, or place of beginning, at its intersection with Bertrand-street, on the lower side, or to the north by Common street, from its intersection with said St. Paul street, and a line parallel with said Common-street, continued until it intersects the line of Bertrand-street, and in the rear, or to the west by Bertrand-street, in its whole length, seized in the above suit.

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Sheriff."

At the sale, John M'Donough, the present plaintiff, became the purchaser for the sum of ninety dollars.

The evidence shows that the boundary specified in the foregoing advertisement, contained a large number of lots belonging to other proprietors than Gravier ; and that no definite account of the number owned by him was ever given.

It also appeared in evidence that the advertisement of this property was first published in English in the Louisiana Advertiser the 16th; and in French on the 24th March, 1830. It was also published in the New-Orleans Argus in English the 18th, and in French on the 19th of March, 1830. The sale took place the 15th April, according to the sheriff's return, and on the 19th, according to his deed made to the plaintiff, which is itself dated the 30th April, 1830. The advertisement states that the sale is to be made on the 19th April, 1830. The law provides that sales of immoveables, slaves and steam-boats can be made *only thirty days after the first notice has been given.* *Code of Practice, article 670.*

Advertisements for the sale of property in the city of New-Orleans, must be inserted three times in two newspapers in the English and French languages. *Code of Practice, 689.*

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The district judge was of opinion that the proceedings in relation to the sale were irregular, and that the formalities of law were not complied with.

Judgment was given for the defendant with costs. The plaintiff appealed.

Mazureau, Grymes and Gray, for the plaintiff.

1. The insufficiency of the advertisements in the newspapers, is the first subject of complaint on the part of the defendant. Upon an inspection of all the preceding cases decided by this court, it will be discovered that its decision has been based upon the total absence of notice, the want of, or a misrecital of the judgment under which the execution issued, or the entire neglect of something enjoined by the law to precede the sale. The articles 669 and 670, of the Code of Practice, are to govern us in deciding this point. It appears from the files of the newspapers in evidence, that the advertisement of the land in dispute appeared in one, in English and French, on the 17th and 19th days of March, in the other in English, on the 16th day of the same month, and in English and French on the 19th of March, and was continued afterwards, in both papers and both languages, almost every day until the day of sale. The article 670 of the Code of Practice, says: "The sale of moveable effects can only be made ten days after the first notice which has been given, and that of slaves, ships, steam-boats, and immoveables only thirty days after the same notice." Now, let the words "first notice that has been given," used in this article, refer to what it will, it is clear from the evidence of the newspapers, that the sale took place after the lapse of time required.

2. If we begin to count from the 16th day of March, when it had appeared in one of the papers in both languages, then thirty-three days had elapsed; if we begin from the 19th day of March, at which time it had appeared in both the newspapers, in both the languages, March having thirty-one days, there was consequently twelve days in that month, exclusive of the 19th, and nineteen days in April, which

makes thirty-one, so that the sale took place on the 31st day after the first notice, counting from the very latest period; and supposing the "first notice" mentioned in the Code, to mean a publication in two newspapers in two languages, or thirty full days had intervened exclusive of the day on which the first notice was complete, and of that on which the sale took place.

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3. It is secondly alleged that the property was not sufficiently described. No legislative provision or direction can be invoked on this point. The code is silent. The description is as accurate as it was possible to make it. It is described in the advertisements and in the act of sale to the plaintiff, as being situated in the rear of suburb St. Mary, and comprised within lines and boundaries well established and well known: known to the public, for they figure on all the plans of the faubourg: known well to Gravier, for he made and established them. It was hardly possible to give any other description, for it results from the testimony on record, that the property of Gravier in that quarter had been placed in such a situation by him that no person could tell what was his, or what rights he had on any, or all of it; if it could not be seized and sold under this description, then he was insured success in his intention to abstract it from the pursuit of his creditors, and to annul this sale and restore him the property will be to reward him for his constant endeavors to defraud his creditors, and evade the performance of his most sacred obligations, even by the commission of forgery and other crimes.

4. It is said, thirdly, that the sale does not correspond with the seizure. The document referred to, to establish this, is the sheriff's return on the execution under which he made the sale, to be found on the back of the writ among the original documents brought up from the Court of Probates. The notice in the newspapers, the sheriff's deed to the plaintiff, and every other document in the cause, concur in the description of the property, and prove the sale to have taken place on the 19th of April. The sheriff's return is dated the 17th day of May, 1830, and purports, as in the nature of

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things it must be, a narrative of his proceedings under the writ. It does not give so minute and accurate a description of the property as the other documents, and it states the sale to have taken place on the 15th of April; but it is difficult to conceive how the relation or intended relation of facts and circumstances, made a month after they happened, can control and falsify circumstances and events noted and elicited at the time they happened, clearly proved by uncontradicted testimony, carrying with them internal evidence of their truth, and consummated by a public and authentic act, which the law declares shall be full proof of what it contains.

5. Fourthly, it is said the property did not produce an excess over and above the mortgages upon it; and that part of the certificate of the recorder of mortgages in evidence, to be found in the record, is relied upon as proof of this fact. In answer to this, we say: 1st. This is not an absolute nullity of which the debtor from whom the land is seized can take advantage of for his own benefit; it is a matter which concerns the mortgagee, and which he may enforce against us if his mortgage has not been satisfied. 2d. That by the sheriff's deed to the plaintiff, it appears that he purchased the property subject to all the mortgages, and that consequently the price he paid into the sheriff's hands was substantially and truly so much over and above all the mortgages, and the law in this matter being substantially satisfied, the mere manner and form of doing it cannot work an absolute nullity. 3d. That when it is said that if property does not bring more than the mortgages existing on it, there is no sale, we must be understood to mean mortgages admitted, or proved to exist, truly and really, and when their existence or reality is denied, they must be proved contradictorily with him who denies them, and by legal and conclusive testimony.

6. The fifth nullity alleged on the part of the defendant, is, that the execution is not in the French language, article 626 of the Code of Practice is relied on. We take the provisions of this article to be merely directory, and to carry with it no absolute nullity unless taken advantage of at the time. The code makes the same provision with respect to petitions

and other judicial proceedings, and the judgment, &c., is not a nullity for this reason. *Code of Practice*, 605, 6, 7. This is only necessary where the maternal language of the defendant is French ; there is no evidence in the record that the maternal language of Gravier was French.

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L. Janin and Demy, for the defendant.

1. A plain statement of the nature of the plaintiff's claim, suffices to show, that it is utterly inadmissible. He claims a number of lots and squares in the rear of faubourg St. Mary, under a sheriff's sale of the 19th of April, 1830, in which the property is described as any property of John Gravier, within the space of ground, bounded in front by St. Paul-street, in the rear by Bertrand-street, on the upper side by Perilliat's line, and on the lower side by the prolongation of Common-street. That space of ground was at the time of the sale, divided into lots and squares, and embraced about thirty-six squares. The whole had formerly belonged to Gravier ; by far the greater part, however, had been sold previous to 1830. It was town property, and what still belonged to Gravier might have been seized and sold, but ought to have been described as town property. The description was such, that nobody could know what property, or whether any property at all was offered for sale. It is proved that neither the appraisers nor the sheriff and deputy sheriff knew what property they were appraising or selling, nor could they know it under such a description. The plaintiff was the only person who knew what property Gravier still owned within the above described limits ; it is, therefore, not astonishing that nobody bid against him, and that he could buy it in for ninety dollars. Under this sale he now pretends to have acquired three entire squares and the greater part of four other squares, besides several other irregular parcels of ground. The evidence establishes that, already in 1830 this property was worth at least eight thousand dollars.

2. It is unquestionably one of the most material requisites of a forced sale, that the property should be described with

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reasonable certainty, in order to convey a clear idea of what is offered for sale. *Code of Practice*, 676, 702. 1 *Louisiana Reports*, 43, and the authorities there cited by the plaintiff's counsel. 4 *Peters's Reports*, 362. 7 *Louisiana Reports*, 409. 1 *Louisiana Reports*, 491.

3. The sheriff can only sell what he has seized, and in this case the sale does not correspond with the seizure. The sheriff's return differs from the description given of the property in the advertisement and deed of sale. 1 *Louisiana Reports*, 44.

4. The property was not advertised according to law. *Code of Practice*, 654, 655, 667 to 669.

5. The writ of *feri facias*, issued in the English language only. It is in proof that Gravier was a Frenchman, and did not speak the English language. *Code of Practice*, 625, 626, 700-1. 3 *Louisiana Reports*, 476.

6. A part of the property was specially mortgaged. As it did not bring the amount of these mortgages, there was no sale. *Code of Practice*, 683, 684. 4 *Martin, N. S.*, 154. 7 *Ibid., N. S.*, 382.

7. It is fully proved that the plaintiff is not an innocent purchaser, and that this sale is his work, brought about by improper means. He procured it to be made, he gave the description of the property, he well knew, and knew alone what property Gravier had behind St. Paul-street, and carefully concealed his knowledge from others, and he kept others from bidding by pretending to purchase only with a view to settle the boundaries of the property owned by him, and many other individuals behind St. Paul-street.

8. We will now add some remarks on the plaintiff's opening brief. The statement of the several dates of advertising in the newspapers is incorrect. The advertisement of sale of 1830, appeared in French in the *Louisiana Advertiser* for the first time, the 24th March.

9. In the third point, plaintiff's counsel assert that the property was described according to plans known well to Gravier, for he made and established them. This is contradicted

by the testimony of Bringier, who proves that Gravier did not know *Bertrand*-street one of the boundaries.

10. The notice of the sale, as published in French, is unintelligible, and amounts to nothing at all.

11. Lastly, it is asserted that there is no evidence to show that the maternal language of Gravier, the defendant in the sale, was French. This is fully proved by testimony in the record.

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Mathews, J., delivered the opinion of the court.

This suit is brought by the plaintiff, to prevent the defendant from proceeding to sell certain property which he had caused to be inventoried and advertised for sale, as curator of the estate of John Gravier, deceased; and to recover damages from the defendant on account of his acts, by which an attempt is made to sell property which the plaintiff alleges to belong to him. The answer contains a denial of any right or title in the claimant, and allegations that the pretended sheriff's sale under which he claims, is null and void; and prays that it may be rescinded, &c. Judgment being rendered in favor of the defendant, the plaintiff appealed.

The facts of the case, as established by the evidence, show, that Gravier, the intestate, who was the owner of the land in the rear of the faubourg St. Mary, laid out a part of it into squares and lots for buildings, intending them to be annexed as city property to the faubourg which had been previously established in front, &c.; that during his lifetime he sold many of those squares and lots to different persons, in conformity with a plan which he had caused to be made. This plan being considered imperfect, as not designating with precision the various parcels of ground sold to the different purchasers, underwent changes by the consent of these parties mutually given, until a plan was finally made and adopted in 1831; in which the defendant acquiesces, as shown by his answer.

Gravier was indebted in large sums to judgment creditors, whose claims were not fully satisfied, and on the 13th day of

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March, 1830, at which time an execution issued against his property on one of those judgments. Under this writ the sheriff seized, as appears by his return, which is uncontradicted, "the right, title and interest of John Gravier to the lands lying between St. Paul and Bertrand streets, in the city of New-Orleans, and sold on the 15th day of April, 1830, to John M'Donough, for the sum of ninety dollars: deduct costs of court and sheriff's fees thirty-three dollars and fifty cents: balance of fifty-six dollars and fifty cents, paid to plaintiff, as per receipt book. Returned the 17th of May, 1830. G. W. Morgan, sheriff."

In addition to this return, made by the sheriff, a deed from that officer is produced in evidence, dated on the 30th April, 1830, reciting the sale as having been made on the 19th of that month.

It is seen from the recital of these acts and their dates, that the plaintiff bought the premises in dispute previous to the adoption of the plan of 1831.

The validity of this sale is attacked, on the ground of omissions on the part of the sheriff to fulfil the formalities required by law in the forced alienation of property under judgment and execution. Another cause of nullity is alleged by the defendant, said to result from the concealment and fraud of the plaintiff, in procuring the seizure and sale of Gravier's property. But the opinion which we have formed on the alleged informalities in the sale, renders it unnecessary to examine this point.

Where the purchaser at a sale under execution shows a judgment, writ of execution, and sale to him under them, made by the proper officer, all previous proceedings by the latter, are presumed to have been correctly made, that is, in relation to the formalities required by law. This presumption is *omnia recte acta*; but this, like all other presumptions, yields to contrary proof.

We consider it now as an established doctrine of our jurisprudence, in relation to sales under execution, that when a purchaser shows a judgment and writ of execution and sale to him under them, made by the proper officer, all previous proceedings by the latter are presumed to have been correctly made; that is, in relation to the formalities required by law, the presumption is *omnia recte acta*. But this presumption, like all others of facts, must yield to proof contrary to it.

The points of the defendant present two principal grounds of nullity in the sheriff's sale to the plaintiff, arising out of the omissions and misconduct of that officer: 1st. A want of

proper description of the property seized ; and, 2d. Neglect to advertise it in the manner and during the length of time required by law. Before examining the evidence in support of these points, and applying the law to them, it is proper to premise that we have always adopted as a maxim, that in forced alienations of property, all formalities required by law must be strictly fulfilled to give validity to such alienations. From the adoption of this maxim it follows, that all persons having an interest to have such alienations annulled, may claim judicially a rescission of the sales by which they are made.

The description of the property seized in the present instance, viewed in the light of city property, laid out into squares and lots, is truly vague and indefinite, and the evidence shows, that neither the sheriff or the appraisers could possibly have had any knowledge of its extent or value. It is true, that the Code of Practice does not point out in express terms, the specific manner in which property seized in execution shall be described. But certainly, a description so totally void of precision as not to enable the appraisers to find the property which they are called on to estimate, or in any other manner to give a clue to its value, would be contrary to the provisions of our laws, intended to protect unfortunate debtors against all useless severity, by which their property might be taken from them, under color of law, at a cruel sacrifice of their interest, by a forced sale of it, indefinitely below its value. Although the mode of proceeding in seizures and sales under execution, in relation to a description of the property seized, is not expressly directed by the code, yet it results from irresistible implication derived from the articles 676 and 702, that property thus seized must be described much more specifically, and with considerable and much greater precision, and certainly more than was done in the present instance. The first article cited provides, that "slaves must be appraised either by the head or by families, and other effects must be appraised with such minuteness that they may be sold together or separately to the best advantage of the debtor, as he may direct. All

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In forced alienations of property, all the formalities required by law must be strictly fulfilled, to give validity to the sale.

Persons having an interest to cause the alienation of property at sheriff's or other forced sale to be annulled, for want of the legal formalities in making it, may claim judicially the rescission of such sale.

In forced alienations, the property must be described with minuteness and accuracy, so that it can be appraised with such minuteness as to ascertain its value, and be sold together or separately to the best advantage.

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So, where a sheriff seized property in execution, and described it as "land lying between St. Paul and Bertrant streets, in the city of New-Orleans," and the evidence showed that the ground between these streets had previously been laid off into lots and squares: *Held*, that this description was insufficient, and that the sale under it gave no title to the purchaser.

According to the article 702, of the Code of Practice, the sheriff is required to specify the object seized and sold, which must be done in the return on his writ, so as to distinguish and specify one object from another.

property seized in execution must be appraised; and we find the law imperative that it must be so appraised, when made up of different and distinct parcels, that they may be sold together or separately, at the option of the debtor.

The sheriff returns in the present instance, that he seized property in the city of New-Orleans, and other evidence in the cause shows that a considerable part, if not all the land seized, was, previous to the seizure, laid out in squares and lots, bounded by certain named streets. He does not, however, specify any of those squares or lots, and consequently put it out of his power, and that of the appraisers, to comply with the requisites of the article of the *Code of Practice*, now being interpreted. According to the article 702, the sheriff is obliged to specify the object seized and sold; and this must be done in his return on the writ. If he seizes more than one object, according to the spirit of article 676, he must specify each and every one seized. The seizure made in this case was really of many distinct objects, if one square or lot in a town may be distinguished from another, either as to locality or in point of value, a proposition which we presume will not be denied. The adjudged cases cited on the part of the defendant, in support of the point which has now been investigated, are not precisely similar to the present, but have a very evident analogy. See 1 *Louisiana Reports*, 43. 4 *Peters*, 362. 7 *Louisiana Reports*, 409, and 1 *Ibid.*, 491. But supposing our reasoning on this point to be feeble and inconclusive, which we are by no means ready to admit, still the second point which we purpose to discuss, does in our view, incontrovertibly support the ground assumed by the defendant; that is, that the sheriff omitted or neglected to advertise the property seized, the full length of time prescribed by law. Being real estate, he was bound to advertise it, in both the English and French languages, for the space of thirty days before the sale. We have already transcribed the return of the officer on the writ of execution, in which he states that the property seized was sold on the 15th of April 1830. This return we stated to be uncontradicted, and we hold this opinion not-

withstanding the discrepancy of dates between the sheriff's deed and his return ; considering the sale and return into court as the real evidence of title in the plaintiff, if any he has, and superior to that of the act of sale, which it must control, in the event of disagreement between the adjudication and the sheriff's deed. The latter is a matter entirely between the officer and the purchaser, the former a solemn and indispensable performance of duty, and addressed directly to the court in which it should become a record not to be contradicted by any thing *dehors*. In support of this opinion, see article 695 of the Code of Practice, wherein it is positively declared that the act of sale adds nothing to the force and effect of the adjudication, &c. If we take the 16th March as the commencement of the advertisements, (the property having been seized on the 13th) and the day of adjudication to be the 15th of April, according to the sheriff's return, thirty days did not elapse between the advertisement and the day of sale, unless both those days be included in the calculation, which is contrary to established practice in such cases, and which gives way only to positive law. The expressions in the article 670 of the Code of Practice, do not impugn this usual mode of calculation which would exclude either the day of sale or the day when the advertisement commenced. For it declares that sales of immoveables shall take place only *after* a notice by advertisement of thirty days. *After thirty days*, cannot mean *within* that period, which would take place in the present instance if both the days of advertising and sale be included in the calculation of time. The law, however, requires property situated in the place where this was when seized by the sheriff, to be advertised both in the English and French languages. The advertisement in French is however not shown to have had place in any newspaper or gazette published in the city before the 19th of March : consequently, the time of advertising required by law is greatly deficient, according to the view of the case which we have taken.

But it is contended that the neglect and omissions of the sheriff in the performance of his duties ought not to prejudice the plaintiff, who is stated to be a purchaser in good faith ;

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Real or immoveable property, situated in New-Orleans, must be advertised in the newspapers, in the English and French languages, for thirty days, excluding the day when the advertisement commenced, and the day of sale, so that thirty clear days may elapse between. The want of this formality is a ground of nullity of the sale.

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and that the causes of nullity relied on by the defendant are not supported by the general principles of our jurisprudence. In support of the doctrine thus assumed, we are referred to the commentary of Toullier on the civil law of France, particularly, to certain numbers or articles found in the 7th volume of this work under the head of extinction of obligations, from No. 479 to 603. We have attentively examined the authority thus cited, not without pleasure, derived from the force and perspicuity of the reasoning of the author, wherever he treats of the nullities of contracts. He divides the subject into acts done contrary to law, and omissions to pursue formalities required by its provisions. This last branch of the subject is examined according to the distinction made by the doctors of the civil law, between substantial and accidental formalities. The first general rule in relation to them is, that when the formality prescribed is founded on natural equity, it is said to be substantial, and its omission carries with it nullity of the act. The author criticises this rule in relation to voluntary and consensual contracts, and perhaps the exceptions to its validity which he imagines, would not apply to judicial proceedings, under which forced alienations of property take place. It is, however, in our opinion, of the essence of justice and natural equity, that when a forced sale of a debtor's property is made under legal proceedings, that it should not be sacrificed for less than its value, or at least that portion of it intended to be secured by a fair appraisement. In this case, the pretended appraisement appears to us to have been a mere mockery of justice, as neither the officer who seized, or the appraisers, had any means of knowing or finding out the value of the property to be appreciated. Should we admit the full force of Toullier's reasoning on the subject of nullities, still exceptions to the rules which he thinks ought to be established would result (it is believed) from the texts of our codes, and from the leading principles of our jurisprudence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An exception to the general rule, that defendants have a right to be sued in the parish where they have their residence and domicile, has been made by the court, in cases necessarily growing out of the provisions of law, in relation to *joint* obligors, who are absolutely required to be sued together.

The necessity of the case does not require that obligors *in solido* should be sued together. To create a new exception in favor of such contracts, would be a violation of positive law.

Strictly speaking, the drawer and endorser of a note or bill, are not bound jointly, either to the holder or amongst themselves, according to the definition in the code, but only *in solido*.

The plaintiff has a clear and adequate remedy by suit, separately against either, the drawer or either of the endorsers of a promissory note, because the obligation is not joint, but *in solido*.

Defendants sued as endorsers, and bound *in solido*, have a right to be sued at their respective domicils. The court cannot create an exception in such cases, which is done when the obligation is joint only.

This is an action against two endorsers of a promissory note, residing in different parishes.

The plaintiff alleges, that one Louis Melchier Raymond, of New-Orleans, executed his promissory note for two thousand dollars, payable twelve months after the 16th January, 1834, to the order of and endorsed by Laroque Turgeau, of the parish of Ascension, and afterwards endorsed by Pierre Dubertrand, of New-Orleans. That said note was duly protested for non-payment against the drawer, and notice thereof given to the endorsers. He prays judgment against said endorsers, jointly and severally, for the amount of the note.

Dubertrand pleaded a respite allowed him by his creditors, by way of exception, to the action against him, which was overruled.

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Turgeau pleaded his domicil. He alleged by way of exception, that he was not amenable to the jurisdiction of the District Court, sitting in New-Orleans, because his domicil was in the parish of Ascension ; and prayed that the suit be dismissed as to him.

This exception was sustained by the judge presiding ; and the plaintiff appealed.

Benjamin, for the plaintiff, assigned for error apparent on the face of the record, the decision of the judge *a quo*, sustaining the exception of Turgeau, to the jurisdiction of the court, on the plea of domicil.

J. Slidell, for the defendant, Turgeau.

1. It is expressly provided, that the District Court has no jurisdiction of actions against persons residing in the state, when the suit is out of the limits of its district or jurisdiction, unless in cases expressly excepted, (this not being one) or when the defendant voluntarily appears and submits to its jurisdiction. *Code of Practice, article 129.*

2. The obligation created by the endorsement of a promissory note, is not *solidary* with that of the maker. It is contingent and conditional. If it be solidary, it does not come within the provisions of the code. See *La. Code, article 2080.*

3. It is also provided by law, that when there are several solidary debtors, the creditor may apply to either of the debtors he pleases, and sue him, without such debtor having the right to plead the benefit of division. *La. Code, 2089.*

One judge dissenting to the opinion of the court, the judges delivered their opinions *seriatim*.

Mathews, Presiding Judge.

This is an appeal from a judgment of the court below, by which a plea to its jurisdiction was sustained, and the suit dismissed as to the present defendant and appellee.

The suit was brought against two endorsers of a promissory note, who reside in different parishes, and an attempt is made

on the part of the plaintiff to bring the appellee, who is domiciliated in the parish of Ascension, before the court of the first district, whilst his residence is in that of the second. The right and privilege of defendants to be sued at the place of their residence, when residing within the limits of the state and at no other place, has been secured to them by the provisions of our laws ever since the act of the legislative council of 1805. To this rule of law, no express exceptions can be found, those only excepted which are contained in the Code of Practice, articles 163 and 164. In addition to those expressed in the code, by a decision of this court, one more has been recognized, necessarily growing out of the provisions of law in relation to obligors exclusively joint ; but, in my opinion, the same necessity does not exist in reference to obligations *in solido* ; and to create a new exception in favor of such contracts, would be in violation of an express and general rule of law, a proceeding not sanctioned either by its letter or spirit. The case of *Allain vs. Longer*, 4 *Louisiana Reports*, 152, although the contract in that and the present one are similar, being both *in solido*, and which seems to be relied on by the plaintiff, brought to the consideration of the court, a question for solution entirely different from that which the case now to be determined presents, and consequently is wholly inapplicable to the present contest. The doctrine in the former case may be just and true, and founded in law, without in any manner interfering with the privilege of defendants to be sued in the place of their domicil, and no where else.

In interpreting contracts made *in solido*, it is worthy of remark, that the definition and rules relating to them in the *Louisiana Code*, do not expressly declare them to be both *joint and several*. It is essential to a joint contract that the obligors should be bound, each one for his *virile* share, the sum promised by him, and no more. It is true that the obligations assumed by the maker and endorser of a negotiable paper, creates a contract *in solido* ; but it seems to me to be joint only in consequence of their promises being based on the same instrument. Strictly speaking, they are not bound jointly

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An exception to the general rule, that defendants have a right to be sued in the parish where they have their residence and domicil, has been made by the court, in cases necessarily growing out of the provisions of law, in relation to *joint* obligors, who are absolutely required to be sued together.

The necessity of the case does not require that obligors *in solido* should be sued together. To create a new exception in favor of such contracts, would be a violation of positive law.

Strictly speaking, the drawer and endorser of a note or bill, are not bound jointly, either to the holder or amongst themselves, according to the definition in the code, but only *in solido*.

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either to the holder of the note, or bill of exchange, or amongst themselves, according to the definition given in the code of a joint obligation.

When a contract joint and several in its terms, that is, one made directly *in solido*, is entered into, it might be questioned whether the obligee could be permitted to consider this contract, in pursuance of his rights on it, as joint alone, although such an obligation may be said to be joint *sub modo*, being so between the obligors.

I am therefore of opinion that the judgment of the District Court ought to be affirmed with costs.

The plaintiff has a clear and adequate remedy by suit, separately against either the drawer or either of the endorsers of a promissory note, because the obligation is not joint, but *in solido*.

Defendants, sued as endorsers and bound *in solido*, have a right to be sued at their respective domicils. The court cannot create an exception in such cases, which is done when the obligation is joint only.

Bullard, J.

In the case of Toby & Co. vs. Hart et al., (8 Louisiana Reports 523) we held that joint obligors may be sued at the domicil of either, and that such a case formed necessarily an exception to the general rule, inasmuch as the obligee would be without remedy against any of the parties, if the exception of domicil should prevail. In the case now before the court, the plaintiff has a clear and adequate remedy by suit, against either of the parties, and the obligation is not joint, but *in solido*. Such a case is not enumerated as an exception, by the Code of Practice, and I think we cannot create a new exception not resulting from necessity, and in a case in which to refuse it would amount to an absolute denial of justice. I, therefore, concur with the presiding judge, that the judgment ought to be affirmed.

Martin, J., dissenting.

The two defendants in this case are sued as endorsers of a promissory note, and reside in different parishes. The suit is brought in the parish in which one of them resides; the other pleaded as an exception his residence out of the parish in which the suit is brought. The exception was sustained, and the plaintiff appealed.

The rule that every one is to be sued before the court of his domicil, is one which the Code of Practice gives us, not as an universal, but as a general one, liable to many

exceptions, some of which are expressed, and others implied. EASTERN DIST.
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We recognised one of the latter lately in the case of a joint obligation ; and I believe that the case of a joint and several obligation presents another calling for the same remedy.

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I admit that the case of a joint obligation is a stronger one than that where the obligation is joint and several. In the former, there would be a failure of justice, if neither of the joint obligors, who reside in different parishes, can be sued but in that in which he resides.

But in the case of a joint and several obligation, where all the parties are each liable for the whole debt, and payment by either of them, discharges all the others, the law gives the creditor the right of suing all his debtors in one single suit. This is extremely convenient to the creditor, and saves to the debtors an accumulation of costs, for they may all be defended by the same attorney.

It facilitates credit, for creditors are willing to indulge in proportion as the recovery is easy. It prevents the multiplicity of suits for the same debt, which the law abhors. There is, besides, a great hardship in compelling the holder of a note to institute thereon as many suits as there are parties on it ; for payment by either mulcts him with costs in all the other suits.

It is admitted he may sue all of them in one single suit, if they all reside in the same parish. It ought not to be in the power of either of the debtors, by a change of residence, to defeat that right.

An argument has been strongly pressed upon us, which with me has very little weight. It is said that in the country, litigation offers to a debtor the facility of keeping his creditors at bay for several years ; and if the latter may compel payment, with less expense and difficulty, they would institute their suits on notes of hand in the courts of the city, on which payment will be obtained before the debtor contemplated he could be legally coerced. Jurisdiction may even be given to the courts of the city in cases in which they have it not, by the addition of the endorsement of a party

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residing in the city. The endorser of a note knows that by the endorsement of it to another, or to the citizen of another state, he may be drawn, not only from his parish, but from the courts of the state to that of the United States.

Every facility which is accorded to the creditors renders credit easily obtained, and procures to the honest debtor indulgence, which he finds sometimes useful. The creditor who is aware that his debtor has the faculty to bid him defiance, loses no time in bringing his suit, and prosecutes it without remission.

Our fellow citizens who reside in the country, find it difficult to obtain money at the interest which the law allows, because the power which they have of protracting payment, deters those who cannot reconcile it to their feelings to exact a high rate of interest, as a security against the trouble, vexation, and consequent danger attending village litigation.

I think the right of exemption from being sued out of one's own parish has an exception strongly implied in the cases in which the law allows one suit against the several co-debtors.

I am, therefore, of opinion we ought to reverse the judgment of the District Court, overrule the exception on the score of commorancy, and remand the case for further proceedings.

MORRIS vs. ABAT ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The provision of the Civil Code, (354, article 57) which gives to the buyer, in case of eviction, the increased value of the property between the time of sale and the period of eviction, which is to be restored by his vendor in warranty, is suppressed and repealed by the adoption of the Louisiana Code.

In case of eviction of the buyer, the seller is *only* responsible for the restitution of the *price*; the fruits or revenues when the vendee has to

return them to the true owner, the costs of suit, and damages, when the vendee has suffered any over and above the price he has paid.

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A city marshal or sheriff, who sells property under execution, is not such a warrantor of title, as to authorise his being cited as such, and condemned to pay as vendor, on a failure of title.

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The marshal or sheriff is responsible in damages to the purchaser, who is evicted for selling a slave, or other property, without sufficient authority.

These officers warrant the correctness and legality of their own acts, and if by their illegal acts, they cause damages, they are bound to make reparation.

This is a petitory action, in which the plaintiff claims a lot of ground in the city of New-Orleans, now in the possession and claimed by the defendant, Abat. The vendors of the latter were called in warranty. The facts of the case are accurately stated in the following opinion of the district judge, who tried the cause in the first instance :

“ This is a suit for a lot of land under circumstances every way similar to the case of *Morris vs. Crocker*, reported 4 *Louisiana Reports*, 147. The only difficulty that has arisen, is between Millaudon, the vendor of Abat, and Macarty, who purchased the lot on a sale by execution in the City Court, for taxes, on the 24th November, 1828, and sold it to Millaudon on the 22d March, 1831, for fifteen hundred dollars, viz: three hundred dollars in money, and twelve hundred dollars in two notes, of six hundred dollars each. Those notes have never been paid, and Macarty now surrenders them. It appears that on the 5th September, 1831, Millaudon exchanged this lot with Abat for other property, and in that exchange, the lot was valued at three thousand dollars. Millaudon, in calling Macarty in warranty, prays judgment against him for all damages, costs and charges, arising from the eviction, and for general relief. Under this answer, his counsel insists that he is entitled to recover from Macarty the three thousand dollars which he, Millaudon, is bound to pay Abat. Macarty pleads that the sale, or exchange, from Millaudon to Abat, is simulated, and was made with the sole intent to extort from Macarty under that pretence double the amount of the value of the lot in ques-

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tion, in case of eviction ; Millaudon being then, at the time of executing this latter act, informed by the plaintiff's agent that the present suit was about to be brought. Admitting the act of exchange between Millaudon and Abat to be perfectly *bonâ fide*, and that the value of the lot, when he sold it, was the measure of recovery against Macarty, it would probably be open to testimony what that value was: an exchange not fixing value to the same degree of accuracy as a money sale ; but as I am of opinion that Millaudon can recover from M'Carty only the price he paid for the lot, this investigation becomes unnecessary.

" By article 2482, in case of eviction, the buyer has a right to claim against the seller :

" 1st. The restitution of the price.

" 2d. Fruits and revenues returned to the evictor.

" 3d. Costs.

" 4th. Damages, when he has suffered any, besides the price that he has paid.

" The damages referred to under the 4th head, are, as I presume, damages suffered by the seller when the buyer has knowingly and dishonestly sold the property of another. Supposing that Millaudon had made an actual sale to Abat for three thousand dollars, and was now obliged to refund him, I do not consider the difference between three thousand dollars and fifteen hundred dollars an actual damage to Millaudon in the legal meaning of the term. He has lost a profit, but not suffered a damage. No man is supposed to spend his capital, and he is presumed to have the three thousand dollars which he received from Abat ready to return to him. On the subject of claims against warrantors, there is a marked difference between the new code and the old code. Article 57, page 354, of old code, is left out of new code on deliberate consideration by compilers of new code. See page 74, of additions and amendments to the Civil Code.

" The compilers saw the dangers of the article of the old code to vendors in good faith, who might be ruined in a country where fluctuations in value are so great ; or rather, fluctuations in the value of money are so great. As it is,

these fluctuations cause the greatest injustice alternately, to the buyer and seller in relation to the price only. It is clear, therefore, that the compilers of the code intended to make the vendor, where he was in good faith, liable only for the return of the price. To give Millaudon a recovery for three thousand dollars against Macarty, would be to give him the increased value, and be in direct opposition to the rule intended to be adopted."

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Judgment was rendered in favor of the plaintiff, for the lot of ground claimed; and in favor of the defendant, Abat, against his vendor, Millaudon, for the sum of three thousand dollars, the price of the sale from the latter to the former, with costs of suit; and in favor of Millaudon against Macarty, for the amount of the sale of the latter to the former, and costs of suit; and that the plaintiff, Morris, pay Macarty five hundred dollars for improvements, which the latter put on the lot while in his possession.

Millaudon and Macarty took separate appeals to the Supreme Court.

J. Slidell, for Millaudon, appellant.

1. The obligation of the warrantor, is to pay to his vendee, if evicted, the damages when he has suffered any, besides the price which he paid. *Louisiana Code*, 2482.

2. The damages due to the creditor for the breach of any contract, are the amount of the loss which he has sustained, and the profit of which he has been deprived. *La. Code*, 1928. The general rule of law is, that damages are due for a profit of which one has been deprived as for a loss sustained; it is of the nature of the contract of sale. *Pothier, Contrat de Vente*, No. 130, 132. *Duranton*, vol. 16, page 312.

3. A positive statutory provision, limiting the responsibility of the vendor to the restitution of the price, or an express mention of the parties to that effect, is necessary to take the case of the sale of real estate, out of the operation of the general principles laid down, in article 1928. No such provision of law has been invoked, and the act of sale gives a full and unqualified warranty.

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J. Seghers, for Macarty, appellant.

1. Macarty had a right to call in the marshal or his heirs, to come and defend his title. 8 *Martin, N. S.*, 356.

2. The judge's opinion, page sixty of the record, is in accordance with the law now in force. The article 57, page 354, of the Civil Code, has been left out in the Louisiana Code, and this suppression was not made through error, but with the express design of repealing a law which proved injurious to the public, in a country where there is so great a fluctuation in the value of real property. See the work entitled *Amendemens au Code Civil*, page 308.

Martin, J., delivered the opinion of the court.

This is a petitory action, in which the plaintiff succeeded in recovering the land for which he commenced his suit. The defendant at the same time had judgment over against L. Millaudon, his warrantor, for the sum of three thousand dollars, that being the amount, or sum at which the land was estimated, in a contract of exchange between these two parties. Millaudon also had judgment over against Macarty, his vendor, for the sum of fifteen hundred dollars, the price which the latter received in his sale to the former.

Millaudon and *Macarty* have both appealed to this court.

The counsel for the former contended in the argument at the bar :

1. That the warrantor is only responsible in case of eviction, for the restitution of the price for which he sold, and the damage the party evicted has sustained in consequence thereof. *Louisiana Code*, article 2482.

2. That damages in such cases consist of the loss sustained and the profits not made. *Ibid.*

3. That a positive statutory provision, only, can silence the general rule.

Macarty resists the claim in warranty against him, on the allegation that Millaudon's conveyance to the defendant is simulated, and that it was made after he had notice of the present suit being about to be instituted, with a view of claiming heavy damages.

The district judge was of opinion that a *bonâ fide* vendor is not bound to indemnify his vendee for the amount of profits not made. He did not examine the case in relation to the allegation of simulation. We are, therefore, only called upon to test the correctness of the opinion of the judge *a quo*, on the legal extent of the vendor's liability in case of eviction of his vendee.

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It is not denied, that under the Civil Code of 1808, the liability of the vendor in cases of eviction, extended to an indemnification of the loss, which resulted from the profits arising from the difference, or increase in the value of the thing sold, from circumstances or events over which the vendor had no control, and to which he had in no wise contributed. It expressly provides that "if the thing sold has risen in value, at the time of eviction, even without the aid of the buyer, the seller is bound to pay him the *increase* of value above the price of sale." *Civil Code, page 354, article 57.*

The provision of the Civil Code, 354, article 57, which gives to the buyer, in case of eviction, the increased value of the property between the time of sale and the period of eviction, which is to be restored by his vendor in warranty, is suppressed and repealed by the adoption of the Louisiana Code.

But the jurisconsults who compiled the *Louisiana Code*, recommended the suppression of this article, as containing a provision evidently dangerous, which might cause the ruin of a vendor who acted in good faith, in a rising, growing and thrifty country like this, in which the fluctuations in the price of property were great, and its value augmenting in an unparalleled degree.

In case of eviction of the buyer, the seller is *only* responsible for the restitution of the price; the fruits or revenues, when the vendee has to return them to the true owner; the costs of suit and damages, when the vendee has suffered any over and above the price he has paid.

This article of the old code, which imposed such fearful responsibility on the seller, was accordingly suppressed, and does not appear in the new one. The vendor's liability is now clearly defined, and placed upon the most equitable footing. He is now only responsible for the price at which he sold; for the fruits or revenues, where the party evicted has restored them to the true owner; the costs of the suit of eviction and warranty, and for any damages the vendor has had to pay. See *Louisiana Code, article 2482.*

To say that the word *damages*, means the loss of profits not made, or to be responsible for the augmentation of the value of the thing sold at the time of eviction, beyond the price of the original sale, would be to restore and carry into effect the entire provisions of the article in the Civil Code which the

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legislature intended to suppress and repeal. It would, in fact, reinstate the article of the former code, which was recommended by the jurisconsults to be suppressed, and which was formally suppressed and repealed on the adoption of the Louisiana Code.

When an avowedly important provision of law becomes an express or textual one, the repeal of the latter must carry with it that of the former, as an acknowledged principle and rule of law ; otherwise the repeal of the other would be vain and idle.

The construction adopted by the district judge, is, in the opinion of this court, perfectly correct. Under this impression, we conclude that neither of the appellants, who are called in warranty, have any just and legal ground of complaint against the decision of the District Court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

After the above opinion was pronounced, the following proceedings were had in this case.

“ On motion of Julien Seghers, Esq., of counsel for Augustus Macarty, one of the parties to this suit, and appellant from an interlocutory judgment, disregarding the call in warranty, made by the said Augustus Macarty, against the beneficiary heir of the late city marshal, and upon suggesting to this honorable court, that the decree of the 23d May, 1836, affirming the final judgment of the court below, has not disposed of this breach of the appeal, it is ordered, that this case lie over for consideration, on the single point relating to the call in warranty, made by the said Augustus Macarty, against the beneficiary heirs of the late city marshal.”

A city marshal or sheriff, who sells property under execution, is not such a warrantor of title as to authorise his being

Bullard, J., delivered the following opinion of the court, upon the foregoing order :

In this case it has been suggested that the court, in delivering its opinion, omitted to notice and to act upon an interlocutory judgment of the District Court, overruling a

call in warranty of the city marshal, by whose agency the property in controversy had been sold. The counsel for Macarty now contends, that the District Court erred in refusing to permit the call of the marshal in warranty, and that the case ought to be remanded for further proceedings against the marshal. We have re-considered the case in this respect, and are of opinion, that the marshal is not such a warrantor of title as to authorise his being cited as such, and condemned to pay as vendor on a failure of title. The case of *Fleming et ux. vs. Lockhart*, 10 Martin's Reports, 398, relied on by the appellant, was one for damages against a sheriff, for selling a slave without sufficient legal authority, brought by the purchaser, who had been evicted by the owner of the runaway. The marshal certainly warrants the correctness and legality of his own acts, and if by his illegal acts he has caused damage, he is bound to make reparation.

The judgment first pronounced must, therefore, remain undisturbed; reserving, however, to Macarty his right of action, if any he have, against the city marshal or his legal representatives.

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PLICQUE & LE BEAU vs. LABRANCHE ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Evidence of the acknowledgment of a party who is sought to be charged, or rendered liable, is the weakest species of evidence; for the witness who testifies cannot be convicted of perjury if he swears falsely, and is almost beyond the power of contradiction.

If a party deny his signature to an act or private instrument of writing, or allege it is counterfeited, it must be proved by witnesses who have seen him sign the act, or know his signature from having frequently seen him

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write. Proof by experts, or comparison of handwriting, may also be received.

Proof by witnesses, of the acknowledgment of a signature by the party who is sought to be charged, is inadmissible, when he expressly denies, or alleges it is counterfeited.

The article 325 of the *Code of Practice*, modifies and supersedes the provisions in the *Louisiana Code*, article 2241, which allows the proof of a signature by witnesses as in other cases.

This is an action on a promissory note for the sum of six thousand dollars, drawn by Antoine Foucher, junior, with the names of Antoine Foucher, senior, and Hermogene Labranche, endorsed in blank on the back of it. The plaintiffs pray judgment against the endorsers, for the amount of the note sued on.

The defendants, Labranche and Foucher, senior, answered separately; and both of them expressly averred that their names on the back of said note, were forged and counterfeited.

The cause, on this issue, was tried before a jury. The plaintiffs called a witness to prove certain acknowledgments made by the defendant, Labranche, that his signature on the back of the note was genuine. The defendants' counsel objected to the question being put to the witness, on the ground that there was no acknowledgment of the defendant specially alleged in the petition, and that no evidence could be received on that subject or fact; but the court overruled the objection, and admitted the evidence of the acknowledgment of the defendant, as being in the nature of evidence of the truth and reality of the signature, reserving to the party, that in case he was taken by surprise he must apply for a new trial. A bill of exceptions was taken to the opinion of the court.

The jury returned a verdict against Labranche, for the amount of the note sued on, and discharged the other defendant. From judgment rendered thereon, Labranche appealed.

Hoa, for the plaintiffs.

Preston and Augustin, for the defendants.

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1. No attempt has been made to prove the signature of the defendant, Labranche, in this case, except by his acknowledgment ; and the confession is that he made the signature in error. It must be taken all together, and therefore proves that the signature is not genuine.

2. Even if the defendant has confessed on a previous occasion that he admitted this endorsement was his signature, it is the weakest kind of testimony. 1 *Louisiana Reports*, 286. 6 *Martin, N. S.*, 532.

3. If the admission was made, it does not render the defendant liable, unless it amounts to an express or implied contract. But it amounts to neither, because it was made without consideration, and in error. *Louisiana Code*, 1887, 1890, 1818, 1819.

4. Admissions or confessions are not obligatory if made in error. *Roscoe on Evidence*, 25 and 34. 1 *Phillips on Evidence*, Note 77. 10 *Massachusetts Reports*, 40.

5. Unless the plaintiffs acted upon the acknowledgment or confession of the defendant, and took the note on the faith of it, *they cannot* claim the benefit of it. 2 *Starkie on Evidence*, 29, 30, 31.

6. Or the plaintiffs must show, that they sustained loss in consequence of the admission. *Louisiana Code*, 2294, 2295.

7. This case presents the single allegation, that the defendant *endorsed* the note, and is liable. He formally *denies* his signature, and alleges that it is counterfeited. The law requires that in such cases the plaintiffs must prove the signature by witnesses, who have seen him write his name or sign the instrument. See *Code of Practice*, article 325, 326.

8. The plaintiff, not having proved his case, which he cannot according to law, the defendant must be discharged.

Martin, J., delivered the opinion of the court.

This is an action on a promissory note. The defendant, Labranche, being sued as endorser of a promissory note,

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Evidence of the acknowledgment of a party, who is sought to be charged, or rendered liable, is the weakest species of evidence; for the witness who testifies, cannot be convicted of perjury, if he swears falsely, and is almost beyond the power of contradiction.

If a party deny his signature to an act or private instrument of writing, or allege it is counterfeited, it must be proved by witnesses who have seen him sign the act, or know his signature from having frequently seen him write. Proof by experts or comparison of hand writing may also be received.

Proof by witnesses, of the acknowledgment of a signature by the party who is

together with Antoine Foucher, senior, pleaded separately and specially, that the endorsement of his name on the back of the note, was forged and counterfeited.

On the trial of the case before a jury, evidence to prove the acknowledgment of the defendant, that the endorsement was in his handwriting, was offered, and to which his counsel objected. It was, however, admitted by the court, and a bill of exception taken.

The district judge who presided at the trial, was of opinion that the acknowledgment of the party, in relation to the genuineness of his signature, is in the nature of evidence, going to prove the truth of this fact, and should be admitted as such. But in case the party is surprised, he has reserved to him the privilege, and informs him he must seek his remedy in an application for a new trial.

It appears to this court that the district judge erred in his decision.

In ordinary cases, the acknowledgment of the party is indeed, in the nature of evidence of the truth of the signature. But it is the very weakest species of evidence that may be adduced. The witness who testifies to the acknowledgment, is placed beyond all danger of being convicted of perjury, and it is almost impossible to contradict him.

When, therefore, a signature is specially denied by the party to whom it is imputed, that weak species of evidence, of his acknowledgment or admissions, is not allowed.

The law has expressly provided the kind of evidence which may be produced to counterbalance the express denial of a signature, to an obligation or act under private signature.

If the demand is founded on an instrument of writing, under private signature, the party, is bound to acknowledge expressly, or to deny his signature. *Code of Practice, art. 324.*

But if the defendant deny or contend that his signature is counterfeited, its genuineness must be proved by witnesses who have *seen him sign* the act or obligation, or who declare that they *know his* signature from having frequently seen him write. Proof also by comparison of handwriting, or by experts, is admissible. *Ibid., article 325.*

The foregoing provisions of our law, repel the idea that the signature of the defendant may be proved by witnesses, who only testify to his acknowledgment of such signature.

The article 325 of the Code of Practice, already cited, modifies and supersedes the provision in the Louisiana Code, article 2241, which declares, that if the party disavows his signature, it must be proved by witnesses, as in other cases.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled, avoided and reversed; the verdict set aside, and the case remanded for further proceedings, with directions to the District Court, not to allow proof by a witness, of the acknowledgment by the defendant of his signature, on the back of the note sued on; the plaintiffs and appellees paying the costs in this court.

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sought to be charged, is inadmissible, when he expressly denies or alleges it is counterfeited.

The article 325 of the Code of Practice, modifies and supersedes the provisions in the Louisiana Code, article 2241, which allows the proof of a signature by witnesses, as in other cases.

PURDON vs. LINTON'S EXECUTORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Parole evidence is inadmissible to prove the simulation of a sale, that the property in question was conveyed as a security to indemnify the vendee against certain endorsements, from which he has since been released.

Parole evidence is admissible to explain an ambiguity arising extraneous of the written instruments, to show that certain property alluded to in a counter-letter was the sole property of the vendor, and must have been that which formed the subject of the sale and conveyance sought to be rescinded.

A written instrument which does not of itself prove a contract of sale of immoveable property, cannot be rendered sufficient by the admission of parole evidence, to explain and enlarge its obligations.

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A letter written by the vendee to the vendor of certain houses and lots, which renders it quite clear that the vendee did not intend really to purchase the property, but merely to hold it as a nominal purchase to secure him against certain endorsements for the vendor, will be received as evidence of the true understanding of the parties.

This is an action to recover and compel a re-conveyance of certain city property, which the plaintiff conveyed to the late John Linton by public act dated May 15, 1834.

The suit is instituted against the executors, the widow in community and heirs of the deceased. The plaintiff alleges that he conveyed the property in question to Mr. Linton to secure him against certain endorsements which he had made on his (plaintiff's) account to the amount of nineteen thousand and thirty-nine dollars; that these obligations were since all taken up and cancelled, but that in the meantime Linton died, and his executors have had this property inventoried as part of his estate.

The plaintiff prays that he be decreed to be the owner of said property, and the executors required to re-convey it to him. He also annexed interrogations to be answered by Thompson, one of the executors and principal clerk of Linton, at the time of the transactions relative to this property, requiring him to state the true nature and character of the sale.

The executor excepted to the right of the plaintiff to interrogate him, inasmuch as it is an attempt to prove, by parole testimony an agreement affecting real property, and the simulation of an authentic act of sale of such property. The exception was sustained by the court.

The defendants then answered and pleaded a general denial, and denied especially that the plaintiffs had any cause of action against them, &c. The plaintiff produced the following letter from Mr. Linton, and offered it in evidence as a counter-letter to show the intention of the parties to the public act; and that the conveyance of the property was intended as a security, only, and not real.

"Dear Sir: I fear that there is some misunderstanding as to the consideration to be inserted in the deed for the levee

property. This conveyance is a real security. If it ever operates as a security, it must not be put at a price that no man in his senses would think of.

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I, therefore, will not consent to receive it at a larger sum than the consideration expressed in the deed; but if you do not understand me, I beg you to come down and let it be decided upon at once.

Yours, &c. J. LINTON.

MR. PURDON.

Thursday, 2 o'clock P M."

Parole testimony was then offered and received, to explain this letter, and which showed it related to the property now claimed. The plaintiff further showed that the endorsements of Mr. Linton, made for his benefit, were since paid off and cancelled.

The district judge to whom the cause was submitted, was of opinion that the letter of Mr. Linton, taken in connexion with the parole evidence explaining it, showed clearly that the act of May 15, 1834, was intended as a security on account of endorsements made by Linton for the benefit of the plaintiff, which have since been taken up and paid. Judgment was rendered, decreeing the property to belong to the plaintiff, and ordering the executors and widow, in community, and tutrix of the minor heirs of Linton, to re-convey the same. The defendants appealed.

Maybin, for the plaintiff.

Peirce, for the defendants.

Bullard J., delivered the opinion of the court.

This case has been submitted upon written arguments, and presents the single question, whether there is sufficient legal evidence in the record to show that a contract between the plaintiff and the late John Linton, purporting to be a sale of certain lots in the city of New-Orleans, was, in fact, not intended to operate as such, but was entered into for the sole

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Parole evidence is inadmissible to prove the simulation of a sale, that the property in question was conveyed as a security, to indemnify the vendee against certain endorsements from which he has since been released.

Parole evidence is admissible to explain an ambiguity, arising extraneous of the written instrument, and to show that certain property alluded to in a counter-letter, was the sole property of the vendor, and must have been that which formed the subject of the sale and conveyance sought to be rescinded.

A written instrument, which does not of itself prove a contract of sale of immoveable property, cannot be rendered sufficient by the admission of parole evidence, to explain and enlarge its obligations.

purpose of securing Linton against certain endorsements, from which he has since been released by the plaintiff.

Parole evidence would be clearly inadmissible, to prove as between the parties, that species of simulation. The plaintiff relies upon a letter from Linton, written to him about the same time the act bears date, as a counter-letter. He begins by saying, that he fears there is some misunderstanding as to the consideration to be inserted in the deed, for the levee property. He then goes on to say, "this conveyance is a real security; if it ever operates as a security, it must not be put at a price that no man in his senses would think of. I therefore will not consent to receive it at a larger sum than the consideration expressed in the deed," &c.

The expressions contained in this counter-letter, certainly repel the idea, that the conveyance alluded to was intended as a sale for a fixed price, and the only doubt is, whether it alludes to the contract in question. It speaks of the deed for the levee property. Here is an ambiguity, not arising from the language used, but from something extraneous. Parole evidence was admissible, in our opinion, to explain such an ambiguity. The evidence shows clearly, that this was known as the levee property, and that the plaintiff had no other in that part of the city. It is also shown, that the parties were in the habit of endorsing for each other, and that at the time of the conveyance, Linton was about departing on a journey to the North, from which he never returned, and that all his engagements were released by Purdon paying the notes which had been endorsed by him. It is further shown, that the property never was delivered to Linton, but has always remained in possession of the plaintiff, who has continued to receive the rents.

It is true, that our code has abolished the old doctrine of commencement of proof in writing, which authorised the admission of parole evidence, to prove that, which any writing emanating from the party rendered probable. In the case of *Allison vs. Fox*, 5 Louisiana Reports, 460, this court held, that a paper which did not *per se* prove a contract

of sale of real estate, could not be rendered sufficient by parole evidence, to explain or to enlarge it, so as to render it obligatory on the pretended vendee. But the present case is different. The paper produced is a counter-letter, which renders it quite clear to our minds, that Linton did not intend really to purchase the property, but merely hold it as a nominal purchase, to indemnify him against his engagements as endorser. He objects to a higher sum being mentioned as the consideration, and that sum is nineteen thousand and thirty-nine dollars and eighty-two cents, and the reason he gives, is, that the conveyance is a real security. It was not, therefore, understood by him as a sale of the property, and we have no doubt, from the evidence before us, that if he were alive he would re-convey to the plaintiff.

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A letter, written by the vendee to the vendor of certain houses and lots, which renders it quite clear that the vendee did not intend really to purchase the property, but merely to hold it as a nominal purchase to secure him against certain endorsements for the vendor, will be received as evidence of the true understanding of the parties.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HARMAN ET AL. VS. M'CAWLEY.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

An emancipation of a minor under the provisions of the act of 1829, gives to him all the power over his property and rights, which appertains to persons of full age.

Whether the minor is domiciled in the parish where the property inherited by him is situated, or in a foreign country, the Court of Probates of the place where the inheritance lies, must appoint a tutor to administer it.

This case comes up on an appeal from a judgment of the Probate Court, rendered on a rule taken by the plaintiffs, to compel the defendant to comply with the conditions of the

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sale of a lot of ground in New-Orleans, purchased by the latter, at the sale of the estate of the late Thomas L. Harman.

The defendant admitted the purchase, but averred that the sale was illegal and irregular, because the property belongs to the minor heirs of Thomas L. Harman, deceased, who reside in England, and the appointment of a tutor by the Court of Probates, in New-Orleans, who caused the property to be sold, was illegal; and that one of the minors was unrepresented by any tutor.

The evidence showed that Thomas L. Harman died several years ago, leaving a large and valuable estate in New-Orleans, where he formerly resided. He left three children, viz: Thomas L. Harman, Thomas S. Harman and Charlotte G. Harman, all minors, who have, ever since his death, resided in England. The eldest son having attained the age of nineteen years, came to New-Orleans, and was emancipated by the first District Court, under the legislative act of 1829. Nathaniel Cox, Esq., of New-Orleans, was appointed by the Probate Court here, as tutor to the two younger heirs, who still reside abroad.

The eldest son and heir, and the tutor to the other two heirs, instituted proceedings in the Probate Court for the city and parish of New-Orleans, and obtained a decree for the sale and partition of the ancestor's estate. At the sale which followed, the defendant, became the purchaser of a lot for the sum of six thousand six hundred dollars. He refused to comply with the terms and conditions of the sale, for the reasons set forth in his answer.

The probate judge made the rule absolute, and the defendant appealed.

Conrad, for the plaintiffs.

1. The domicil of the minors is in Louisiana. They were born in this state, and this was the domicil of their parents before, at the time of, and after their birth. Their parents continued to retain this domicil up to the time of their death, as is apparent from the declarations of the father, contained in his will, executed only a few months before his death, and

from other circumstances. Here was his principal place of business, and here was situated almost all his property. His temporary absence from the state did not effect a change of his domicil. *Story's Conflict of Laws*, No. 44.

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2. Since the death of their father, the legal domicil of the children has continued to be in this state: 1st. Because it is the domicil of their tutor. *Louisiana Code*, article 48. 2d, Because a minor cannot "*ex proprio motu*" change his domicil. *Story's Commentaries*, No. 46.

3. Even supposing the minors to be domiciliated elsewhere, the appointment of a tutor in this state, where all their property is situated, would be regular. *Louisiana Code*, article 1092. *Code of Practice*, article 946. *Berluchaux vs. Berluchaux*, 7 *Louisiana Reports*, 539.

4. As to the second objection. From the time that Francis S. Harman was dispensed with the time prescribed by law, for attaining the age of majority, he ceased *ex vi terminorum* to be a minor, and became, to all intents and purposes a major. The law of 1829, was passed, (like the law of 1827, relative to divorces,) to disembarrass the legislature from the numerous applications, that were constantly pouring in upon them, for dispensations from the age of majority, by statute. Its language is too clear to require or admit of any argument.

Benjamin, for the defendant.

1. The domicil of the minors is permanently in England. They should, therefore, have been represented by those guardians and tutors, who are entrusted with the care of their persons and property in England. Those provisions of the law, on which appellees rely, (*Louisiana Code*, article 289. *Code of Practice*, article 946,) have reference only to the appointment of tutors to minors, for special purposes, but the policy of the municipal regulations of all civilized countries, evidently contemplates, that the general administration of minors' estates, shall be confided to those guardians who are appointed to them at their domicils.

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2. The emancipated minor could not act without the intervention of a curator, nor could he take any steps which might affect his real property. Therefore he had no right to bring this action of partition. *La. Code, 376, 1236.* And the act of 1829, authorising their emancipation, does not derogate from the provisions of the code.

Mathews, J., delivered the opinion of the court.

In this case, it appears that Thomas L. Harman and Francis S. Harman, sons and heirs to the estate of their deceased father and mother, instituted proceedings in the court below, for the purpose of obtaining a partition of certain real property, situated in this city, belonging to the successions of their ancestors. The suit was originally brought against N. Cox, as tutor of the sister, and co-heir of the plaintiffs. The tutor appears to have been regularly appointed to that office, by competent authority of this country. Proceedings were had on the application for a partition; (and they appear to us to have been all conducted according to the provisions of our laws on this subject,) which resulted in the probate sale of valuable squares and lots of ground in the faubourg St. Mary, which constituted the largest portion of the successions as above stated; in other words, where the principal estate of the heirs is situated. At this sale the defendant and appellant, M'Cawley, became the purchaser of a lot, which was regularly adjudicated to him, for the sum of six thousand six hundred dollars, payable by instalments, one-sixth of which was to have been paid in cash, and the balance on certain terms of credits, none of which have yet expired. The purchaser refused to make the prompt payment, as required by the conditions of the adjudication; and the present suit was commenced to compel him to fulfil his obligations, incurred by the terms of the sale. His answer contains allegations of the want of legal authority, in two of the parties to the action for a partition, viz: Francis S. Harman and the tutor of the minor, who is now in England. The objections made to the authority and powers

of these parties to act, were overruled by the court below, from which the defendant appealed.

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It is true, that F. S. Harman, who united with his brother of full age, in the petition for a partition, was under the age of majority; but was some months more than twenty years old, and was regularly emancipated; or rather free from the disabilities established by law, for the protection of minors, and by a judgment of the District Court, rendered in pursuance of the provisions of the act of legislature, passed in eighteen hundred and twenty-nine, relating to the emancipation of minors above the age of nineteen years. See *Session Acts of 1829, page 24*. An emancipation thus obtained, gives to the minor all the powers over his property and rights, which appertain to a person of full age; consequently the articles of the Louisiana Code, cited by the counsel, for the appellant, in relation to this branch of the cause, are not applicable.

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An emancipation of a minor, under the provisions of the act of 1829, gives to him all the powers over his property and rights, which appertain to persons of full age.

The advocates of the plaintiffs have labored much in their brief of argument, to show that the real domicil of the minor, to whom a tutor was appointed, is in this parish; this is perhaps true, according to the provisions of our laws. This question, however, need not be settled, for the minor was domiciled either in New-Orleans, or out of the state; and in either hypothesis, the Court of Probates here had authority to appoint a tutor to administer her inheritance, this being the place where her principal estate is situated. In support of this proposition, see Louisiana Code, article 298. This provision of law must govern this case, according to the decision of that of *Berluchaux vs. Berluchaux* and others, reported in 7 Louisiana Reports, 539 and 545, as it does not appear that the minor has any guardian or tutor regularly appointed in England, admitting that country to be the place of her domicil. The article 946 of the Code of Practice, so far from militating against this doctrine, is calculated to support it.

Whether the minor is domiciled in the parish where the property inherited by him is situated, or in a foreign country, the Court of Probates of the place where the inheritance lies, must appoint a tutor to administer it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, be affirmed with costs.

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KEYS AND WIFE
vs.
POWELL ET AL.

KEYS AND WIFE vs. POWELL ET AL.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, THE JUDGE
THEREOF PRESIDING.

Parole testimony is admissible to prove that a written instrument was executed in a different place from the one at which it purports to have been passed.

The place at which an act was passed is not essential, and the party may well show by the testimony of a witness that the instrument was in fact executed at a different place, in order to rebut the presumption of forgery or perjury, arising from other circumstances in the case.

A continuance should be granted on an affidavit, to obtain the testimony of a subscribing witness, to show that the bill of sale under which the party claims was witnessed by him, and executed at a different place from that stated in the body of it.

This is a petitory action, in which the plaintiffs claim certain slaves in the possession of the defendants.

The defendants claim the slaves in question in virtue of a private act of sale, under the ordinary mark of the vendor, one James Sides, attested by two subscribing witnesses, dated at East Baton Rouge, February 28, 1825. See the facts of this case, reported in 7 *Louisiana Reports*, 143.

When the case was first on trial, the plaintiff, to rebut the evidence of title produced by the defendants, exhibited a power of attorney executed by James Sides, the defendants' vendor, in the state of Mississippi, on the 28th February, 1825, to one Job Keys, to sell certain property in Baton Rouge, the very day on which the bill of sale of the slaves purports to have been made in the parish of East Baton Rouge, and one hundred and seventy miles distant from the former. On the return of the cause to the District Court, one of the defendants made an affidavit for a continuance, for the purpose of taking the testimony of one G. W. Hankins, a subscribing witness to the act of sale under which defendants claim the slaves in their possession, by whom they

expect to prove that the act was executed in the state of Mississippi, instead of East Baton Rouge, as it purports on its face; and that it was so dated at the request of said Sides, who stated at the time he considered it should be so dated, because he had agreed with Job Keys to sell him the slaves in the parish of East Baton Rouge; that he had received the consideration there, and the slaves were in possession of Keys, in said parish. That Hankins, the witness, wrote the bill of sale as directed by Sides, &c. The plaintiffs' counsel objected to the continuance on the ground that *parole evidence* could not be received to establish the facts sworn to, or contradict the written instrument.

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The defendants' counsel insisted on the continuance, on the ground that the fact of the written instrument being dated at one place, and proved to have been executed at another, had a tendency to raise the presumption of forgery and perjury, which could only be rebutted by parole evidence showing the real place of execution. The court overruled the motion for a continuance, and the defendants took their bill of exceptions.

The plaintiffs had judgment, from which the defendants appealed.

Elam, for the plaintiffs, contended that the decision of the district judge was correct, in refusing the continuance. The evidence disclosed by affidavit was inadmissible, even if it were obtained, because it goes to contradict the act of sale under which the defendants claim title to the slaves. It would not rebut the presumption of perjury or forgery. 7 *La. Reports* 143.

2. Parole evidence is inadmissible, and cannot be admitted to prove any thing contradictory to a written instrument. *La. Code*, 2286, 1 *Martin*, N. S. 641. 2 *Ibid.* 361. 3 *Ibid.* 692. 3 *La. Reports*, 118.

3. The act under consideration is a mere private bill of sale, signed with the ordinary mark of the vendor, and not such an instrument as will convey the title to slaves in this state. *La. Code*, 2415, 2231—2.

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4. This act is not binding on the vendor, *Sides*, or his heirs, it not being susceptible of proof. 7 *Martin, N. S.*, 58, 2 *La. Reports*, 596, *La. Code*, 2961, 2285.

Morgan, contra.

Bullard, J., delivered the opinion of the court.

This case was before us at August term, 1834, (see 7 *Louisiana Reports*, 143) and was then remanded for a new trial. The appellant now relies on a bill of exceptions taken to the opinion of the court, overruling a motion for a continuance.

The defendant moved for a postponement of the trial, on account of the absence of one of the subscribing witnesses to a bill of sale, under the ordinary mark of the vendor. The affidavit is in the usual form, and the defendant states on oath, that she expects to prove by the absent witness that he was present when the vendor put his mark to the bill of sale, and that, in fact, it was executed in the state of Mississippi, although the instrument itself purports to have been executed in East Baton Rouge, and the reason for so dating it. The continuance was opposed, on the ground that no parole evidence could be received to establish the facts sought to be proved, inasmuch as it would go to contradict the written evidence. The continuance was refused, and a bill of exceptions taken.

Parole testimony is admissible to prove that a written instrument was executed in a different place from the one at which it purports to have been passed.

The place at which an act was passed is not essential, and the party may well show by the testimony of a witness, that the instrument was in fact executed at a different place, in order to rebut the presumption of forgery or perjury, arising from other circumstances in the case.

It has been urged by the appellees, that it is not competent to contradict the tenor of a written instrument, by showing that it was executed in a different place from the one at which it purports to have been passed, and that parole evidence of a sale of slaves by an instrument bearing only the ordinary mark of the vendor, is inadmissible, and that the witness, if present at the trial, could not have been examined on that point. We are of opinion the court erred in refusing the continuance. The place at which an act was passed, is not essential, and the party might well show that the instrument was, in fact, executed at a different place, in order to rebut a presumption of forgery or perjury, arising from other circumstances in the case.

Whether effect can be given to a paper under the ordinary mark of a vendor of lands or slaves, or whether such can be in law regarded as written evidence, is a question which we do not consider it proper for us to decide upon, incidentally upon a mere motion for a continuance. That question must be reserved until the case stands for decision on its merits. For the purpose of showing by a subscribing witness that the bill of sale was signed by him as a witness, at a place different from that stated in the body of it, we think the trial ought to have been postponed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed; and it is further ordered, that the case be remanded for a new trial, the plaintiffs and appellees paying the costs of this appeal.

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LA. TOW-BOAT
COMPANY.

A continuance should be granted on an affidavit, to obtain the testimony of a subscribing witness, to show that the bill of sale under which the party claims was witnessed by him, and executed at a different place from that stated in the body of it.

DAVIS vs. LOUISIANA TOW-BOAT COMPANY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The record and judgment of a suit by another party against the defendants, condemning them to pay damages occasioned by the plaintiff's conduct, while in their employment, is admissible in evidence to prove *rem ipsam*, i. e. that the money was recovered.

The judgment in a suit to which the plaintiff was not a party, does not form *res judicata* against him; yet when he had notice, and took an interest to prevent a decision against the defendants, they are exculpated from neglect or collusion.

The plaintiff claims a balance due him for wages and disbursements, as master of the steam tow-boat Grampus, in the employment of the defendants, (an incorporated

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vs.
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COMPANY.

company) amounting to the sum of five hundred and three dollars, according to an account annexed. He alleges he has demanded payment, which has been refused, and he prays judgment for said sum.

The agents of the defendants, by way of answer, filed an account current with the plaintiff, by which they admit a balance is due to him of three hundred and nine dollars and fifty-two cents, for which they allege no amicable demand was ever made, and which they were, and had always been, ready and willing to pay.

On the trial, the defendants offered in evidence the record and proceedings of a suit of Smith & Gardiner against the present defendants, in order to charge the plaintiff with the amount of the judgment in that case, to which the plaintiff's counsel objected, on the ground that he was no party to the said suit and proceedings. The court admitted it in evidence, and added that the record was admitted, not as conclusive, but as *prima facie* evidence in the case, under the proof of notice of the pendency of the suit. To which opinion of the court the plaintiff excepted.

This record was offered to prove the following item in defendants' account, as annexed to his answer :

"June 19. To cash paid judgment and costs of suit of Smith & Gardiner, for sinking a flat-boat, \$187 37."

The court was of opinion that the defendants' account was nearly correct, and gave judgment for the plaintiff in the sum of three hundred and thirteen dollars, with interest and costs. He appealed.

Buchanan, for the plaintiff, contended that improper evidence was admitted in receiving the record and proceedings of Smith & Gardiner against the defendants. This was a judgment in a separate case, to which the plaintiff was no party. It was as to him *res inter alios acta*. 6 *Martin*, 227. 7 *Martin*, N. S., 584.

2. The judge *a quo* erred in charging the amount of this judgment to the plaintiff, when he was no party, and when it did not appear that he was in fault, or liable for said sum.

3. The judgment is erroneous in allowing the amount of Smith & Gardiner's judgment, amounting to one hundred and eighty-seven dollars and thirty-seven cents, in compensation of the plaintiff's claim, when compensation was not specially pleaded. *Code of Practice*, 367.

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COMPANY.

L. C. Duncan, contra.

Martin, J., delivered the opinion of the court.

The plaintiff, master of one of the defendants' boats, sues for wages and advances.

The defendants claimed a set-off for the amount of a judgment obtained against them on account of the loss of a flat-boat, ran down by the boat of which plaintiff was master. His claim was allowed, but the deduction was made; wherefore, he appealed.

His counsel urges that the District Court improperly overruled his objection to the admission in evidence of the judgment as *res inter alios acta*.

The judge did not err: the judgment was admissible to prove *rem ipsam*: i. e. that the money was recovered.

On the merits, the testimony shows the plaintiff was advised of the claim against the company, and of the necessity of his attention to the disproval of it. He attempted to disprove it, but proved unsuccessful. The attempt was made by designating to the company's counsel witnesses who might enable him to defeat the claim. He has, however, introduced a witness, who relates the circumstances which attended the loss of the flat-boat, and who has expressed his opinion that it cannot be imputed to the plaintiff.

The District Court has given less weight to the opinion of this witness, than to the fact he has related. Although the decision of the suit against the defendants, in a case in which the plaintiff was not a party, does not form *res judicata* against him; yet, as he was informed, and appeared to have felt that he had some interest to prevent the decision that took place, and he exerted himself accordingly, it must

The record and judgment of a suit by another party against the defendants, condemning them to pay damages occasioned by the plaintiff's conduct while in their employment, is admissible in evidence to prove *rem ipsam*, i. e., that the money was recovered.

The judgment in a suit to which the plaintiff was not a party, does not form *res judicata* against him; yet when he had notice, and took an interest to prevent a decision against the defendants, they are exculpated from neglect or collusion.

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exculpate the defendants from the imputation of collusion or negligence.

The present suit presented the plaintiff with a new opportunity to establish the fact that the flat-boat was lost without any neglect or fault being imputable to him. The decision of the District Court has been adverse to him. The question is one of fact, in which the opinion of the first judge has always much weight with us. A close examination of the evidence has resulted in the conviction that the plaintiff has no ground of complaint.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BAYON vs. MAYOR ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The Supreme Court will not, on a rule to show cause, examine the order of an inferior judge *refusing* to grant a *mandamus* as prayed for. The only legitimate mode of revising the orders or judgments of inferior courts, is by appeal.

This is the case of an application for a *mandamus* to the district judge of the first judicial district.

The plaintiff applied in the first instance to the district judge, by petition, to grant a *mandamus*, commanding the mayor of the city of New-Orleans, to issue a warrant on the city treasurer, for five hundred dollars, being a quarter salary due him, (the plaintiff) as city printer. He alleges that a resolution passed the city council by the requisite majority, recognising his claim, and authorising it to be paid, but that the mayor refuses to issue a warrant on the treasury, without which he cannot get his money. He prays for a *mandamus*.

9	579
122	59

The district judge was of opinion this was not a proper case for a *mandamus*, and endorsed his order of refusal on the petition.

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The plaintiff then applied to the Supreme Court, and took a rule on the district judge, to show cause why a *mandamus* should not issue, commanding him to grant the one prayed for against the mayor.

The judge showed for cause that he did not consider the application as coming within the provisions of law. It was sought under the Code of Practice, article 829. He considered this article modified by the subsequent provisions of the Code of Practice, articles 830, 831.

That it is not every *denial of justice* which is to be remedied by *mandamus*; but only where there is no relief by the ordinary means, or where the public good, and the administration of justice, in a general sense, will suffer without it.

The mayor is a part of the corporation, and if it will not do its duty, let the plaintiff resort to his ordinary action against it.

Preston, for the plaintiff, urged the court to make the rule absolute.

Martin J., delivered the opinion of the court.

Bayon having obtained from the city council the allowance of a claim, the mayor refused the warrant on the treasury, without which, payment could not be obtained. Application was made to the court of the first district, for a *mandamus* to the mayor. This was refused, and a rule has issued to the judge, to show cause why a *mandamus* should not be granted, for refusing to comply with the applicant's request.

The Supreme Court will not, on a rule to show cause, examine the order of an inferior judge, refusing to grant a *mandamus* as prayed for. The only legitimate mode of revising the orders or judgments of inferior courts, is by appeal.

The judge has shown cause, that the applicant's legal remedy is not that which he seeks. It appears to us, that the only legitimate mode in which one can revise the decision of an inferior court, is by appeal.

It is, therefore, ordered, that the rule be discharged with costs.

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vs.
GAY ET AL.

GERMAN vs. GAY ET AL.

91	580
46	1493
9	580
110	83
9	580
112	549

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The community of acquests and gains is terminated by the death of one of the parties. The survivor has no right to sell the whole property. The heirs of the deceased partner, if they accept the succession, either tacitly or expressly, become joint owners; and if the surviving partner sells, he can convey no greater right than he has himself.

Where the surviving partner sells slaves, or other immoveable property of the community, his vendee will become co-proprietor with the heirs of the deceased partner.

The distinct interest of the parties to the community, attaches at the dissolution of the marriage, subject to the right of the wife or her heirs to renounce, and be exonerated from payment of the community debts.

The heirs of a deceased partner in the community of acquests and gains, having a joint interest, can maintain an action for their interest against the third possessor of a slave, alienated by the husband, after the dissolution of the community.

The husband's authority, as head of the community, ceases on the dissolution of the marriage.

The District Court has jurisdiction of a partition of a community. Both parties cannot, in such case, claim as heirs, and the Probate Court has not exclusive jurisdiction.

This suit is instituted by the heirs of Mrs. Nancy Nicholls, deceased, late wife of Reuben Nicholls, against one Alfred Gay, as the third possessor of a slave which formed part of the community property of Mr. and Mrs. Nicholls, and which was sold by the former to the defendant after the death of the latter.

The plaintiff, Mrs. German, alleges she is sole child and heiress of the deceased, and as such, entitled to half of the community of acquests and gains; that the slave in question made a part of said community at the death of her mother,

and has been since illegally sold to the defendant, as she is joint owner, and entitled to the one-half, which is of the value of five hundred dollars. She prays judgment against the defendant for this sum, and that the slave be sold to effect a partition, &c.

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The defendant pleaded a general denial, and averred that he purchased the slave now in contest from Reuben Nicholls, for the price and sum of six hundred dollars. He cites Nicholls in warranty, and in case of eviction, prays judgment against his warrantor for the sum he loses, &c.

The warrantor pleaded as a peremptory exception, that the plaintiff had never been recognised as heir of the deceased Mrs. Nicholl, by the proper tribunal; that no partition of the alleged community existing between Nicholls and wife had been made, and that this suit cannot be maintained, because it is not alleged that any settlement of the community had taken place, or any partition made.

The facts assumed on the trial of this exception, were, that Mrs. Nicholls died the 3d March, 1835. The plaintiff is her only child by a former marriage with one Thomas Wood. After the death of the wife, Nicholls sold the slave in question to the defendant. A community of property existed between the deceased and her husband, and this slave was acquired during their marriage.

The district judge sustained the exception and dismissed the suit. The plaintiff appealed.

Benjamin, for the plaintiff.

1. It appears from the pleadings, which must be taken as true, for the purpose of inquiring into the validity of the exception, that the plaintiff is sole heir of her mother, who was in community with Nicholls, and that the community was owner of the slave mentioned in petition.

2. The plaintiff's title, as heir to one-half of the slave, is a good basis for a petitory action. *Bedford vs. Urquhart et al.*, 8 *La. Reports*, 247. See also *La. Code*, 934 to 941, inclusive.

3. The judge of the court below is mistaken in the supposition that in the dissolution of a community, each party, or

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his, or her representatives, is not entitled to one-half of the specific objects which belonged to the community. See *La. Code*, 2371, *et seq.* 7 *La. Reports*, 216.

4. The previous settlement of the community was not necessary to entitle plaintiff to sue, for the obvious reason, that even should she be found a debtor to the estate on such settlement, that fact could not possibly impair her title to that moiety of the slave which she inherited from her mother, and which is now sued for.

5. As to the jurisdiction of the court, the judgment is clearly erroneous. See *Session Acts of 1825*, page 122. 7 *Martin, N. S.*, 469.

McMillen and Roselius, contra.

Bullard, J., delivered the opinion of the court.

In this case, the appellant assigns for errors apparent on the face of the record, that the court sustained an exception not valid and maintainable in law.

The plaintiff, as heir at law, of Nancy Trier, late wife of R. Nicholls, and in community with him, sues the defendant for one-half of a slave, of the value of five hundred dollars, which belonged to the community, and which she alleges was sold by the surviving husband, after the death of his wife.

The defendant sets up title to the slave, by sale from Nicholls, and cites him in warranty. Nicholls, the surviving husband and warrantor, puts in the exception, which was sustained by the court below, and the suit dismissed, to wit: that the plaintiff cannot maintain the present action, because she has never been recognised by the proper tribunal, as heir of Nancy Trier, and there has been no partition of the alleged community, and because it has not been alleged, that any settlement of the community has ever taken place or any partition thereof ever made. Assuming as facts that the slave was the property of the community, that shortly after its dissolution, the surviving husband took upon himself to sell her at private sale, the question presented by the exception is, whether the heir of the wife has a right to

recover one undivided half, without alleging that a partition had been made, and the community settled. EASTERN DIST.
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This suit is substantially one of partition; the plaintiff claiming to be in the right of Mrs. Nicholls, joint owner with the defendant, and demanding a severance of their interest. It cannot be doubted, that the community is terminated by the death of one of the parties; if the husband survives, he has no longer a right to sell the whole property. The heirs of the wife may renounce or accept the community; if they accept either tacitly or expressly, they become joint owners with the surviving husband; and if the husband sells he can convey no greater right than he has himself, and his vendee will become co-proprietor with the heirs of the wife. Suppose he were to sell all the property composing the mass, how could there be a partition at all, between the husband and the heirs? According to our understanding of the code, the distinct interest of the parties attaches at the dissolution of the marriage, subject, however, to the right of the wife or her heirs, as the case may be, to renounce, and thereby exonerate herself from the payment of the debts of the community; in which case she loses all right to the property. "The effects which compose the partnership or community, says the code, are divided into two equal portions between the husband and the wife, or between their heirs, *at the dissolution of the marriage.*" *Article 2375.*

That provision of the code which declares that all the property acquired during the marriage, is considered as profits, is regarded by the district judge as a mere rule of evidence, and he is of opinion, that a distinct interest does not vest in the wife or her heirs, before a settlement and liquidation of the community. But if this were true, it would be difficult to reconcile that part of the code, which authorises the heirs of the wife, or herself if she survives, to attack alienations made by the husband even during the marriage, which had been made in fraud of her rights. If her eventual right depended altogether on a settlement to be had of the community, she would be without any right of which she could be defrauded. The community of acquests

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The community of acquests and gains is terminated by the death of one of the parties. The survivor has no right to sell the whole property. The heirs of the deceased partner, if they accept the succession either tacitly or expressly, become joint owners, and if the surviving partner sells, he can convey no greater right than he has himself.

Where the surviving partner sells slaves, or other immoveable property of the community, his vendee will become co-proprietor with the heirs of the deceased partner.

The distinct interests of the parties to the community, attaches at the dissolution of the marriage, subject to the right of the wife or her heirs, to renounce and be exonerated from payment of the community debts.

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The heirs of a deceased partner in the community of acquiescence and gains, having a joint interest, can maintain an action for their interest against the third possessor of a slave, alienated by the husband, after the dissolution of the community.

The husband's authority as head of the community, ceases on the dissolution of the marriage.

The District Court has jurisdiction of a partition of a community. Both parties do not, in such case, claim as heirs, and the Probate Court has not exclusive jurisdiction.

and gains, as regulated by our code, does not differ materially from that which existed by the Spanish law. This question has been much agitated by the jurists of Spain; and Gómez, in his commentaries on the laws of Toro, gives it as his opinion, that on the dissolution of the community, the rights of the wife attach subject to her right of renunciation. *Gomez ad Leges Tauri, law 53, No. 76.* In this case the institution of the present suit was an acceptance of the community, and the plaintiff having a joint interest in the slave, subject to the payment of one-half the debts, the only question is, whether she can maintain this action against a third possessor. That question was settled in the case of *Gravier vs. Livingston, 6 Martin, N. S., 401.*

The pretensions of the surviving husband, (and it must not be forgotten, that the exception comes from him,) rest upon the supposition, that he has in law a right to settle and liquidate the community, and that the rights of his wife depend upon such settlement and liquidation, which must be done with him, and with him alone. If from this he infers that he has a right to sell any of the property, composing the mass of gains of the community, we know not on what law he bases such pretensions. His authority as head of the community ceases on the dissolution of the marriage. The right of the heirs of the deceased party then attaches to have a partition of the effects or property, in equal portions, subject to the payment of the debts. If in the present case, the heirs of the wife were now to sue the husband for a partition, the slave in question could not form the direct object of suit or action, because she is no longer in the husband's possession. In effect, he by his own act defeats the very action, the exercise of which he contends is essential to complete the title of the plaintiff.

It is further said, that the District Court has no jurisdiction of a partition of a community. This court has decided otherwise. Both parties do not in such a case claim as heirs, and, therefore, the Probate Court has not exclusive jurisdiction. *7 Martin, N. S., 470.*

We are of opinion the court erred in sustaining the exception.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, that the exception be overruled, and the case reinstated and remanded for further proceedings, according to law; and that the appellee pay the costs of this appeal.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

According to the provisions of the Spanish law, (Partida 4, 11, 1 and 17) the wife has a tacit mortgage on the property of her husband, for the restitution of both her dotal and paraphernal effects.

The part of the legislative act of 1813, which requires marriage contracts to be recorded, in order to have effect as a mortgage against third persons, on the property of her husband for the restitution of the wife's dotal or paraphernal effects, was repealed by the adoption of the Louisiana Code, in 1825.

Where the wife signs an act of mortgage with her husband, given to secure a debt for his benefit, in which she renounces formally all her rights, privileges and mortgages on the property, ceding and transferring them to her husband's creditor: *Held*, that this is a contract entered into by the wife conjointly with her husband, *binding* herself for his debt, which is expressly prohibited by the Louisiana Code, article 2412; and such renunciation on her part is null and void.

The wife cannot validly bind herself for her husband or for his debts, even with his consent; for this would place her rights entirely under his control.

This case arises under a rule taken by the purchaser of two lots and improvements thereon, seized and sold by the plaintiffs, as the property of A. Dimitry, on the sheriff and the creditors of Dimitry, who had mortgages to show cause why they should not be erased and cancelled.

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Mrs. Dimitry, the wife of the defendant, made opposition to the rule, on the ground that she had a prior mortgage to that of the plaintiffs, under which the property was sold, resulting from a marriage contract, passed before Pedesclaux, notary public, the 4th April, 1803. She also asserted that she had other mortgages, anterior to that under which the premises were sold.

The evidence showed that Mary-Ann Dragon, (now Mrs. Dimitry) and Andreas Dimitry, were married the 10th October, 1799. That on the 4th April, 1803, the father, by notarial act entitled, *declaratoria de dote*, reciting the marriage of the parties without any constitution of *dot* or dowry, gives to his daughter, Mrs. Dimitry, seven thousand dollars in money and two slaves, which the husband acknowledges to have received in advancement of his wife's hereditary rights.

In February, 1834, the wife obtained a judgment of separation of property from her husband, and for the sum of seven thousand dollars, with interest and mortgage.

On the 26th November, 1832, Dimitry mortgaged the lots of ground mentioned in the order of seizure and sale, situated on the corner of Hospital and Conde streets, in New-Orleans, to one Paul Zoits, to secure him against an endorsement of two notes, amounting to six thousand two hundred and forty dollars. Mrs. Dimitry joined her husband in the act, and renounced her right of mortgage to the property. She declares that she renounces formally, as well for herself as for her heirs and assigns, all the rights, privileges and mortgages which she has or may have, to or on the property mortgaged, ceding and transferring them to said Zoits and his assigns.

Zoits transferred all his right, title and interest in this mortgage to the present plaintiffs, who had the mortgaged property seized and sold on the 5th February, 1834, when John F. Miller became the purchaser. He now seeks to have the mortgages erased and cancelled by the sheriff.

The District Court decided, that in its opinion, the sheriff had a right to erase the mortgages under the circumstances of the case, and made the rule absolute. Mrs. Dimitry appealed.

Benjamin and Schmidt for the plaintiffs.

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1. The plaintiffs were the first and anterior mortgagees, and the sheriff is bound to release and cancel the mortgages of the subsequent mortgagees in favor of the purchaser. *Code of Practice, article 708.*

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2. The subsequent mortgagees have no right to contest the plaintiff's right and privilege, as first mortgagor, when his debt and interest absorbs the whole of the mortgaged property.

Canon, for the opponent, Mrs. Dimitry, contended that her legal mortgage was still in full force ; and that her renunciation was null and void, being prohibited by the *article 2412 of the Louisiana Code.*

Bullard, J., delivered the opinion of the court.

The plaintiffs having caused to be sold, under an order of seizure and sale, a certain lot of land belonging to the defendant, Dimitry, took a rule on the present appellant, Madame Dimitry, to show cause why the sheriff should not erase her mortgage on the property sold. She shows for cause that she has a prior legal mortgage on the property of her husband, resulting from her marriage contract, and recognised by judgment of a competent tribunal, which had pronounced a separation of property between them.

The certificate of the register of mortgages sets forth a general mortgage in favor of Madame Dimitry on the property of her husband, resulting from an act before Pedesclaux, notary, dated November, 1803, by which the husband acknowledges to have received from his wife's father seven thousand dollars on account of his wife. This act was not recorded in the office of the register of mortgages, until after the date of the special mortgage in favor of Zoits, which was afterwards transferred to Gasquet & Co.

The plaintiffs, on the other hand, showed that Madame Dimitry united with her husband in the act of mortgage to Zoits, and consented to it, expressly agreeing to renounce all prior claim on the property in favor of the mortgagee, and they contend that her renunciation is binding on her. The

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question, whether the court erred in making the rule absolute, and directing the sheriff to erase the mortgage of the wife, involves two inquiries: 1st, whether she has exhibited evidence of the legal or tacit mortgage on the property of the husband, of a prior date to the special mortgage of the plaintiff; 2d, whether her renunciation, made in the act of mortgage to Zoits, jointly with her husband, and with his consent, be binding and obligatory upon her.

I. The document referred to as forming the basis of the rights of the wife is dated April 4, 1803, and purports to be a *declaracion de dote*. It recites that the parties had been married on the 10th October, 1799, without any constitution of dower, and the husband by that act acknowledges to have received from the father of his wife the sum of seven thousand dollars, and two slaves, in advancement of her hereditary rights. In the judgment of separation of property, this instrument is referred to as proving the right of the wife to recover from her husband the sum of seven thousand dollars, with the benefit of a legal mortgage.

According to the provisions of the Spanish law, (Partida 4, 11, 1 and 17,) the wife had a tacit mortgage on the property of her husband, for the restitution of both her dotal and paraphernal effects.

It is not necessary to inquire whether this sum constituted, properly speaking, the dower, or the paraphernalia of the wife, inasmuch as both are equally secured by tacit mortgage on the property of the husband, according to the law in force at that time. *Partida 4, title 11, law 1 and 17.*

The part of the legislative act of 1813, which requires marriage contracts to be recorded, in order to have effect as a mortgage against third persons on the property of her husband, for the restitution of the wife's dotal or paraphernal effects, was repealed by the adoption of the Louisiana Code, in 1825.

The objection that this instrument was not recorded according to the provisions of the act of 1813, but remained dormant until after the date of the mortgage given to the plaintiffs, is sufficiently answered by the fact, that the part of that act which required a document of this character to be recorded, in order to give to the wife a tacit mortgage in relation to third persons, was repealed by the new code, and that in the meantime the plaintiffs had acquired no right on the property in question.

II. The counsel for the appellant, in support of the position that the agreement on the part of the wife to renounce her claims on the mortgaged property is null and void, relies upon article 2412 of the Louisiana Code, which is in the following words: "The wife, whether separated in property

by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage." The question thus presented is to be decided by us without reference to the laws of Toro, which have no longer here the force of laws, and independently of former decisions of this court, while guided by the Spanish jurisprudence ; but we are called on to say, what in our opinion is the law of the land, on this subject, as established by the code, standing by itself.

That this is a contract entered into by the wife, jointly with her husband, *binding herself* for a debt contracted by him, we do not doubt, although she does not agree to pay the debt out of her own property, yet she consents to renounce her own real right in the property, in favor of the creditor, and thereby furnishes a pledge for the better security of this debt. She declares that she renounces formally, as well for herself, as for her heirs and assigns, all the rights, privileges and mortgages which she has or may have, to or on the property mortgaged, ceding and transferring them to the said Zoits and his assigns. This contract, while it tends to afford a better security for the ultimate payment of the debt contracted by the husband, contains the immediate alienation by the wife, of a real right in the thing, "*jus in re*," for a consideration not personal to herself, but for the benefit of the husband or his creditor. She may be said, therefore, to have bound herself for a debt contracted by the husband.

The article of the code relied on is prohibitory in its terms, declaring the incapacity of the wife to bind herself in such cases, and the 12th article declares that, whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed.

But to this it is answered by the counsel for the appellees, 1st, that the wife's incapacity to contract is removed by the consent of the husband ; 2d, that the article 2412, being intended for the protection of married women, they have a right to renounce its benefit ; that such renunciation is not prohibited by law ; and that in this case, the wife did formally renounce the benefit of that law and all others in her favor.

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The wife cannot validly bind herself for her husband or for his debts, even with his consent; for this would place her rights entirely under his control.

In answer to the first part of this argument, it may be said that the incapacity of the wife to contract in ordinary cases for her own benefit, without the consent of the husband, is removed by his consent, and even that his consent is in some cases implied. But her incapacity to bind herself for him, and jointly with him, for a debt of his contracting, rests on different principles. The proposition that the wife may validly bind herself for her husband, provided he consents to it, appears to us not sustainable. Such a doctrine would place the rights of the wife under the complete control of the husband.

The principle next invoked, to wit: that persons may renounce what the law has established in their favor, is, with certain limitations, established by the 11th article of the code. But the same article declares that individuals cannot by their conventions derogate from the force of laws for the preservation of public order, or good morals, and it permits the renunciation only, when it does not affect the rights of others, and is not contrary to the public good.

It must be confessed that the rule thus laid down as the guide of the tribunals, when called on to decide in what cases a renunciation of the benefits of particular laws may be permitted, or in other words, what laws are for the public good, and cannot be derogated from by the agreements of individual citizens, is extremely broad and vague, and would seem to demand from judges the duty sometimes to look beyond the text, and to inquire into the general policy of the law, and the motives of the legislator.

In every well organised state, those laws which establish the order of hereditary succession, which regulate the capacity to dispose by last will, and particularly, those which define the capacities and incapacities of particular classes of persons, and especially of minors and married women, in reference to contracts, would seem to stand first in rank of those rules involving the great interests of public order, and essential to the welfare of society. If those persons could by their own act remove disabilities, under the spurious shape of a renunciation of the promised protection of the laws, it is

manifest that such laws themselves would be wholly nugatory. It would present the extraordinary anomaly of a person declared incapable of making a particular contract, yet endowed with capacity to remove his own disability at will. In cases where the rights of third persons would be affected, little or no difficulty would arise in the application of the rule, and in reference to laws strictly prohibitory, it is not easy to reconcile, in any case, the right of individuals to derogate from their form and application, with the positive declaration of the code, that whatever is done in contravention of such laws shall be void, although such nullity be not expressly denounced.

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The view we have taken of this question, coincides substantially with the opinions of foreign jurists, whose writings we have had occasion to consult. 3 *Merlin's Repertoire, verbo Dérogation*. 1 *Toullier, page 87 et seq.*

To these authorities may be added that of Gomez in his Commentary on the 61st law of Toro, in which this question is treated *ex professo*. He concludes that the wife cannot in any form, validly bind herself for her husband, because such contract embraces an indirect donation in favor of the husband, which is forbidden and reprobated by law. *Gomez ad Leges Tauri, 636*.

Such appears to have been the construction put upon this part of the code by the legislature, who have thought it necessary and expedient to remove the disability of wills, in relation to contracts with certain banking companies, incorporated since the promulgation of the code.

We therefore conclude, that the appellant is not bound by her contract, and that the nullity of that agreement is not cured by her renunciation. But we cannot accede to her prayer, to decree to her the notes given for the price of the property sold, as she is bound to pursue a particular order, in discussing the property of her husband.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed; that the rule taken on the appellant be discharged with costs in both courts.

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ON A RE-HEARING.

Where the wife renounces her right of mortgage in favor of her husband's creditor, as a security for a debt of his contracting, she thereby becomes his security, and does indirectly that which she is positively forbidden by law to do directly.

The wife may sell or enter into the contract of mortgage, in relation to her dotal or paraphernal effects and rights, with her husband's consent, but such contracts must be for her benefit, or that of her and her husband.

It is not of the essence of suretyship, that the obligations of the principal and surety should be co-extensive. If the wife renounce her right of mortgage, and cede it in favor of her husband's creditor, she becomes surety for a debt of her husband's contracting, so far as her interest in the mortgaged property is concerned.

The *Senatus consultum Velleianum* of the Roman law, is the fountain of our legislation, in relation to the rights of married women. As relates to mortgages and sales, the *Senatus consultum* gave the wife, who had pledged her own property to a creditor of her husband, the right to recover it back, although it had been sold by the creditor.

In this case a re-hearing was applied for, and obtained.

Benjamin, for the plaintiffs and appellees, made the following points:

1. The instrument termed *declaratoria de dote*, on which the wife rests her pretensions and claims to a mortgage, was executed in 1803, under the Spanish laws, and must be tested by them. The common principle running through both the Spanish laws and our codes is, that to constitute dotal property, it must be expressly stipulated or constituted as such in a marriage contract between the spouses, either before or at the time of marriage. Without such contract and express stipulation, all the property of the

wife, whether present or future, is extra-dotal or paraphernal. *Civil Code*, 326, article 16, et seq. *Louisiana Code*, 2317, et seq. These articles of the codes are but a re-enactment of the Spanish law. See *Curia Philippica*, lib. 2, comercio terrestre, cap. 12, prelacion, No. 35. *Perez y Lopez*, Teatro de legislacion, vol. 11, 265, verbo Dotes.

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2. If the rights of the wife, in this case, are paraphernal, as is shown, in order to have effect against third persons, her mortgage for the restitution of her paraphernal property must be recorded. See *Louisiana Code*, article 3297.

3. The article 3298, declares that the mortgage of the wife, on the property of her husband for her dotal rights, exists without being recorded. The article 3303, in speaking of the husband's obligation to record his wife's mortgage, mentions only her *dower*, evidently contemplating that as she has control of her paraphernal rights, she must herself cause them to be inscribed, in order to bind third persons. All legal and conventional mortgages must be recorded, in order to bind third persons. *Louisiana Code*, articles 3314, 3317.

4. The wife may, with her husband's consent, alienate her paraphernal property, and this even by gratuitous title: a *fortiori* may she alienate, renounce or relinquish the mortgage given by law, to secure that property. *Louisiana Code*, 2367, 1467.

5. The judgment of the court is based on the article 2412, of the Louisiana Code, which prohibits the wife from binding herself in any manner, with, or for her husband, and for debts of his contracting. She has not bound herself for a debt of her husband in this case. She has simply renounced a mortgage on his property, not contracted on obligation as the article of the code contemplates.

6. It is expressly provided, that individuals may, in all cases renounce what the law has established in their favor, when such renunciation does not affect the rights of others, and is not contrary to the public good: and the wife's incapacity is removed by the authorisation of her husband. *Louisiana Code*, article 11, 1779.

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7. The renunciation of the wife is an alienation absolute or conditional of a real right, in favor of a third person by gratuitous title ; and she is authorised to make this alienation with the consent of her husband. *Louisiana Code, 1467.*

8. The law which gives the legal mortgage to the wife, for the security of her dotal or paraphernal property, is not one made for the preservation of public order and good morals, but only such as are of a penal nature, and enforce moral duties, such as treat of domestic authority of the heads of families and education of children, &c. ; and not such as touch on the rights of property in the relation of husband or wife.

9. The article 2337 and following, prohibit the alienation of immoveables settled as dowry. These and the article 2412, are the only ones which restrict the wife's capacity to contract with third persons when authorised by her husband. The negative of these articles is pregnant with the affirmative, that she is capable of contracting and alienating all other rights. Paraphernal immoveables may be alienated, and she may make donations *inter vivos*. From all which, it is respectfully asked that the court reconsider and change its judgment.

D. Seghers, on the same side.

1. The appellants respectfully call the attention of the court to a single point : whether the law at the time of the renunciation, or that in force at the date of the marriage, is to govern ?

2. The court seem to have correctly adopted the laws in force when the marriage was contracted, when they say it is unnecessary to inquire whether the claim of the wife is dotal or paraphernal, as both were equally secured by tacit mortgage on the property of the husband. *Partida 4, 11, 17.*

3. According to the laws then in force, the wife had the capacity to renounce her general mortgage, and accept a special mortgage, that her husband might be better enabled to carry on his commercial and financial business. But if the article 2412 of the Louisiana Code is to be applied to this

marriage, entered into before its adoption, it will have a retrospective effect, and impair a clause in the marriage contract, without which the husband might have declined contracting. *Napoleon Code*, 1554. *Sirey, Code annoté* on this article, Nos. 1, 27. *Merlin, Question du Droit*, vol. 12, page 329, verbo *Régime dotal*, section 2, and pages 332, 333.

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4. The question, whether the renunciation made by the wife of her tacit mortgage on her husband's property, for the restitution of her dotal and paraphernal effects, is binding on her, under the Spanish law, has been solemnly decided and put at rest by this court, in the case of *Tremé vs. Lanaux*, 4 *Martin, N. S.*, 230.

5. The whole doctrine which should govern the present case, was reviewed in the above decision, and settled in favor of the right of the wife to renounce. Mrs. Dimitry was married while the Spanish law was in force. Her rights and capacity must be governed by that law, as far as her dotal and paraphernal interests and claims are concerned, and not by the Louisiana Code as it stands since the repealing act of 1828, when all the civil laws were abrogated. See *Merlin's Répertoire*, vol. 26, pages 16 and 17, verbo *Puissance Maritale*. 4 *Louisiana Reports*, 191.

Conrad, for plaintiffs, contended, that this case should be decided by the provisions of the laws in force when the marriage was contracted, which is viewed merely as a civil contract. Viewed in this light, no subsequent legislation could vary or impair its obligatory effect. *Louisiana Code*, 87. *Constitution of the United States*, article 1, section 10.

2. The legislature has nowhere said that the provisions of the Louisiana Code shall apply to marriages entered into before its adoption. The code itself says: "A law can only prescribe for the future; it can have no retrospective operation." *Louisiana Code*, 8. *Merlin's Répertoire de Jurisprudence*, verbo *Puissance Maritale*, sec. 2 et seq. *Questions du Droit*, verbo *Régime dotal*, sec. 1, No. 1.

3. It is a general principle that married women may contract with the consent of their husbands in all cases where

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other persons are permitted to contract, unless they are especially prohibited. • It is also a legal axiom that any one may renounce a provision of law intended for his benefit, unless such renunciation is expressly or impliedly forbidden. The right of mortgage of the wife is intended for her exclusive benefit, and no law is to be found which expressly or impliedly forbids her to renounce it in favor of whom she pleases. See *Louisiana Code*, article 11, 1775 and 1779.

4. The simple question to be solved, is, does a renunciation by a wife of her right of mortgage in favor of a creditor of the husband, make her the surety of the latter? Suretyship is defined to be an agreement by which a person binds himself for another who is already bound, and *agrees with the creditor to satisfy the obligation*, if the debtor does not. *Louisiana Code*, 3004.

5. In the case before us, the wife does not bind herself; she incurs no obligation, and the creditor of her husband acquires no claim against her. In no possible contingency, can she be made liable for her husband's debt. We contend, therefore, that a wife, by renouncing her mortgage in favor of a creditor of her husband, does not, directly or indirectly, become bound, either as surety, or otherwise, for her husband.

Mr. Conrad then argued at considerable length to show that the capacity of the wife to renounce her right of mortgage, was not in derogation of a public law, and not contrary to good morals and public policy.

J. Seghers, for the plaintiffs, added the following points and authorities. He contended that there was no proof that the money mentioned in the *declaratoria de dote*, was counted or paid down to the wife, at the time, which was necessary to constitute a *dot*, or *dowry*. 7 *Martin*, N. S. 460. 8 *Ibid*. 459. 1 *Louisiana Reports*, 373. 4 *Ibid*. 422.

2. If the payment of the money is not proven contradictorily with the creditors, the wife has no claim to the preference, as there is, with regard to them, neither privilege nor mortgage. *Febrero Ad.*, vol. 4, part 2, lib. 3, cap. 3, sec. 2, Nos. 132 and 136.

Canon, for the appellee, Madame Dimitry.

1. The court has well said in its judgment, that by the Spanish laws *dotal* and paraphernal effects are both equally secured to the wife by a tacit mortgage on the property of her husband. This law must govern in relation to the rights of the wife under the instrument called *declaratoria de dote*.

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2. As regards the dowry or donation which the husband gives to the wife, or the wife to her husband, they may be made *before* or *after* the marriage is contracted. *Partida* 4, 11, 1.

3. All the things called paraphernal, enjoy the same privilege as the dowry itself, in the same manner as the estate of the husband is bound to the wife, where he alienates or dissipates her dowry. *Ibid.* 4, 11, 17.

4. The customs or laws of the country and those in force at the time of contracting the marriage, must govern as regards the dowry, &c. *Ibid.* 4, 11, 24.

5. The law of the *Partidas* cited in the last point, is also the doctrine of the French writers on the civil law, because such are real rights which attach to the real property of the husband, which binds in whatever hands it may come.

6. The renunciation of the wife, must it be governed by the laws in force at the time of the marriage, or when it was made? We contend that in this case the Louisiana Code, adopted in 1825, must govern. But if even the former, *i. e.* the Spanish law, was to prevail, Mrs. Dimitry's renunciation would be null; for the law was not explained, and it was not made according to the forms of the Spanish law. 4 *Martin, N. S.*, 230. *Partida* 3, 18, 58.

7. But the case of Tremé *vs.* Lanaux's syndics, 4 *Martin, N. S.*, 230, is not applicable to this case. The renunciation of Mrs. Lanaux there discussed, was made in 1823, before the adoption of the Louisiana Code.

8. The article 2412 of the *Louisiana Code* is conclusive in this case, and it positively prohibits the wife from becoming security for her husband and his debts, or binding herself in any way for him. This article repeals former laws contrary to it, or irreconcilable with it. It is not retrospective or retroactive, but makes positive provisions in relation to future

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June, 1836. Merlin, Dictionnaire de Jurisprudence, verbo Effet retroactif.

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9. The legislature intended in the provision of article 2412, in times of extravagant speculation, like the present, to protect married women from ruin, and to save them and their families from beggary and destruction.

A re-hearing of the case was allowed as prayed for, and it was argued at the bar by counsel on both sides.

Benjamin, for the plaintiffs, submitted the following points and authorities on the final hearing :

Mrs. Dimitry cannot succeed in this cause without maintaining each one of the following propositions :

1st. That the instrument called *declaratoria de dote* is such as to entitle her to a legal mortgage on the property in question.

2d. That this mortgage affects third persons without being recorded.

3d. That the renunciation of this mortgage was invalid, and not legally binding on her.

The plaintiffs controvert each one of these positions on the following grounds and authorities :

1. The instrument in question gives no mortgage whatever, and has no effect against creditors, because it is deemed in law a disguised donation of the husband to the wife. *Acosta de privilegios, page 161, No. 33.*

2. If it is at all valid, it confers on her only paraphernal rights. It is not good as a dowry, because dowry can only be constituted by *express* words, *at or before* marriage, and not *after*. *Old Code, page 326, article 16, et seq., Louisiana Code, article 2317 et seq. Curia Phillippica, lib. 2, comercio terrestre, cap. 12, prelacion, No. 35. Perez y Lopez, Teatro de Legislacion, tom. 11, page 265, verbo Dotes. Curia Phillippica Ilustrada, tom. 2, lib. 2. Com. Ter. cap. 12. Prelacion, No. 34.*

3. She has no mortgage on this property, because it was community property, and she has not renounced the commu-

nity, and consented to the act under which the property was sold. *Troplong Hypothèques*, vol. 2, No. 433, *bis et seq.* and the authors there cited. The mere separation of property is not a renunciation. *Louisiana Code*, 2404. A notarial act is requisite. *Ibid.* 2384.

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II. If the mortgage exists at all, it is only for paraphernal rights and required registry to bind third persons. Plaintiffs' mortgage was passed on 26th November, 1832, and as to the wife, bears registry from that date, because she was party to it. Her mortgage was recorded on 30th November, 1833. Plaintiffs have, therefore, the priority. *Session Acts*, 1813, page 208. *Louisiana Code*, 3297—8 and 3303—14—17. *Paillet on article 2135, arrêt de la Cour de Riom. Grenier sur hypothèques*, vol. 1, 482, and the decisions there cited.

Those French writers who hold the contrary doctrine, base their opinions on certain articles and expressions in the French Code, which are purposely omitted or changed, in the Louisiana Code.

III. The renunciation was valid, and binding on the wife. The cause must be decided according to the law in force at the time the marriage was contracted. If decided by those laws, the case is settled in our favor by the judgment in *Tremé vs. Lanaux*, 4 *Martin*, N. S. 230.

2. If the cause be decided under the laws now in force, the judgment must still be for plaintiff. *Civil Code*, article 11. The wife's renunciation does not come within the exceptions of that act. See *Louisiana Code*, 2305, 2306—7. *Toullier* vol. 1, No. 111. *Ibid.* vol. 12, No. 13. *Duranton*, vol. 8, Nos. 17 to 34, inclusive.

3. Nor is the wife precluded by article 2412, of the Louisiana Code. This contract is not a suretyship. *Ibid.* 3004. 4 *Martin*, N. S., 230. She is authorised to alienate paraphernal property with her husband's consent, *Louisiana Code*, 2367; even to make a donation of it, *Ibid.* 1467; and these contracts are, or may be, more onerous than suretyship. Her renunciation is not in the nature of a donation to her husband, because she reserves her personal claim against him, and her mortgage on all other property.

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One of the judges dissenting, the opinions were delivered *seriatim*.

Mathews, presiding Judge.

This case has its origin in a rule taken on the defendant, to show cause why a legal mortgage which she holds on the property of her husband, should not be erased from the records of the recorder of mortgages, on the ground that she had relinquished and abandoned in favor of the plaintiffs her right and claim as general mortgagee, on a specific portion of the property of her husband.

The case is now before the court on a re-hearing. In our former decision, two of the judges only took part; the third being at that time interested in the question. That interest having since ceased, he now takes cognizance of the cause, and dissents. When the case was before us on the first hearing, we examined the questions involved in it with great care and deliberation, as being new, and having an important bearing on the transactions of the citizens of the state generally. The cause has been argued much at length on the last hearing, but I am constrained to say, that after giving due and unbiased weight to the arguments, they have not had the effect to change my former opinion, deliberately formed after laborious investigation as may be seen by the judgment already pronounced, by the junior judge of the court.

The question to be solved, arises out of a contract of mortgage made between the husband and the plaintiffs, in which the wife, by his consent, interposed and bound herself to postpone her legal mortgage to that stipulated by her husband, as a security for the payment of a debt by him solely contracted.

A correct decision of the case, depends mainly, if not exclusively, on a just interpretation of the 2412th article of the Louisiana Code. It is expressed in the following terms. "The wife, whether separated in property, by contract or judgment, or not separated, cannot bind herself for her husband, nor even jointly with him, for debts contracted by

him, before or during the marriage." It is true, in the present case, that the wife did not bind herself personally to pay a debt contracted by her husband, but she bound herself to relinquish and transfer to his creditors, and for their benefit, rights vested in her by law, to secure the payment and discharge of a debt contracted by him for his individual benefit. If her contract had extended to all the property of her husband, it would have amounted to a total abandonment of the privileges secured to her by law, relative to her paraphernal property, and in my opinion, contrary to the spirit of the article of the code now under consideration. She could not have become surety for her husband, and the attempt in the present instance, to do indirectly, that which the laws prohibit to be done directly, cannot be tolerated. For, what essential difference is there between a contract which abandons all her rights, and gives them up as security for the payment of the debts contracted by her husband, and becoming surety for him, directly to the amount of these claims and rights? Why should a wife be allowed to yield her inchoate right to property, as security for the debts of her husband, when she is prohibited by law to bind herself in any manner to pay such debts? So long as the legislature think proper to continue in force those prohibitory laws made for the security of married women, to protect them against their weakness in regard to their husbands, and to shield them against the improvident solicitations of the latter, in relation to pecuniary interests, who are too often ill managing, and frequently profligate and unskilful, it is the duty of courts to see that those protecting laws shall not be violated, either directly or indirectly.

It has been argued, that as a wife can sell her property with the consent of her husband, she might well, with his consent, make the less onerous or serious contract of mortgage, and one still less onerous, by which she relinquishes her right of mortgage. Perhaps she may sell her mortgage validly. But such contracts must be presumed to be made for her own benefit, or for the mutual benefit of

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Where the wife renounces her right of mortgage in favor of her husband's creditor, as a security for a debt of his contracting, she thereby becomes his security, and does indirectly that which she is positively forbidden by law to do directly.

The wife may sell, or enter into the contract of mortgage in relation to her dotal or paraphernal effects and rights, with her husband's consent; but such contracts must be for her benefit, or that of her and her husband.

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herself and husband, by which she calculates on gain. Yet, admitting these contracts to be completely binding on her, it does not follow as a corollary that she could give her property in payment of the debts of the husband, without being able to rescind the contract, which is a case much more analogous to the present, than either of the two first supposed.

I am, therefore, of opinion, that the former judgment should remain undisturbed.

Bullard, J.

It is hardly necessary I should say more than that I concur in the opinion just pronounced by the presiding judge. It has always appeared to me, that the only question in the case is, whether the wife, by yielding her precedence to a creditor of the husband, as to the rank of their mortgages, bound herself either directly or indirectly for a debt of her husband's contracting, in the sense of article 2412 of the code ; because, if that article be prohibitory, it creates a legal incapacity to contract, and the contract being null, it is admitted on all hands, that she cannot validly renounce ; or, in other words, give herself a capacity which the law has denied her.

It cannot be denied that this is a contract ; it is an agreement not to do. Mrs. Dimitry agrees not to enforce her mortgage, to the prejudice of Zoits, a creditor of her husband. If he enjoyed the right of being first paid out of the property mortgaged, he derives that right from this agreement or contract ; and the object of this proceeding is, to enforce it. It has been said that, like a receipt for a sum of money, this agreement gives rise to no legal obligations on the part of Mrs. Dimitry. It certainly conferred a legal right on Zoits which he did not possess without it, and by means of which his debt was more amply secured. She does not bind herself personally to pay the debt, it is true ; but it is not of the essence of suretyship that the obligations of the principal and the surety should be co-extensive. If A consents that B may mortgage the former's land, to

It is not of the essence of suretyship, that the obligations of the principal and surety should be co-extensive. If the wife renounce her right of mortgage, and cede it in favor of her husband's creditor, she becomes surety for a debt of her husband's contracting, so far as her interest in the mortgaged property is concerned.

secure the payment of a debt personal to the latter, in what relation do they stand to each other? If Mrs. Dimitry, instead of ceding her precedence, had consented to the pledge of certain evidences of debt due to her personally, to guaranty the payment of Zoits's claim, will it be contended that she did not become *pro tanto* surety, for her husband? Will it be said, that she did not bind herself to a certain extent for a debt of her husband's contracting?

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It has been said, that the wife may sell her own paraphernal property, and nothing prevents her from paying a debt of her husband out of the proceeds. It is not so clear, that in such a case she might not recover back from her husband's creditor money paid under such circumstances; money which she did not owe, and which she could not validly promise to pay. The Roman law is not now in force; but the *Senatus Consultum Velleianum* is the original fountain of our legislation on this subject, and it applied to all contracts and engagements whatever. As relates particularly to mortgages and sales, the *Senatus Consultum* gave the wife, who had pledged her own property to a creditor of her husband, a right to recover it back, although it had been sold by the creditor; and Pomponius teaches us that, if a woman, who has sold an immoveable to a creditor of the husband, having delivered it on condition that he should impute the price to the husband's debt, should sue for the property, he might, indeed, set up the sale as an exception, but she would be permitted to reply that the sale was in contravention of the *Senatus Consultum*, whose dispositions apply to the case. *Pandects, law 16, title 1. Pothier's Pandects.*

The *senatus consultum velleianum* of the Roman law, is the fountain of our legislation in relation to the rights of married women. As relates to mortgages and sales, the *senatus consultum* gave the wife, who had pledged her own property to a creditor of her husband, the right to recover it back, although it had been sold by the creditor.

The article of our code in question, is full and comprehensive in its language, and, in my opinion, intended to prevent married women from intervening in any manner in the contracts between the husband and his creditors, by which their rights might be ultimately affected to their prejudice. So long as they enjoy those immunities by law, and labor under those disabilities, they are entitled to the protection of courts of justice.

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I cannot consider the lien which a wife has on the husband's estate, as an advantage which she is not at liberty to renounce, because it was introduced for the support of public order. As early as in the fourteenth century, as appears by a law of the *Partidas*, the obstacle which was opposed by this lien to the alienation of real property, was considered so intolerable that wives renounced it. This the legislator mentions not in terms of disapprobation, but as a measure which it was proper to encourage and facilitate. Accordingly, the form of a wife's renunciation was established by law. See *Partida*, 3, title 18, law 58.

This was several centuries before the laws of Spain were introduced into Louisiana. From that early period, till the year 1828, the constant jurisprudence of Spain and Louisiana recognised and supported the right of the wife to renounce her lien.

One solitary commentator appears to have called this in question in Spain. In Louisiana, I am not aware that it ever was doubted. I, therefore, find it impossible to assent to the proposition, that a right which for centuries has received the countenance and support of the legislature and courts of justice, can at this late period be declared by the judiciary power to be derogating from good morals and sound policy, unless the late change in our laws by the repeal of the Spanish law, imperiously demands a decision adverse to the right.

It is said it does, because, as the right of renouncing was given by the law of the *Partidas*, cited, the repeal of that law must abrogate the right.

I conceive that law of the *Partidas*, not as introducing a new principle, but as declaratory, or recognitive of an ancient one. The preamble recites that wives at times consented to the alienation of the real estate of their husbands, and the legislator publishes a form thereafter to be used in such cases. This is a legislative recognition, that the renunciation of the wife was a legitimate act, not at all derogatory of good morals or sound policy.

The repeal of the law of the Partidas, cited, leaves, in my opinion, the matter as it stood before the law was enacted ; and as the right has been recognised for centuries, as compatible with good morals and sound policy. I have no data from which I may infer that it was otherwise before. I am aware of the Roman maxim : *Interest rei publicæ ut mulier in dotata non remaniat*. But nothing authorises me to conclude that it ever was introduced as a part of the Spanish law, or that if it ever was, it has been abrogated by the general repeal of those laws in Spain.

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On the repeal of the Spanish law in this state in 1828, some members of the bar expressed a doubt in regard to the renunciation of wives after that period. About this time, an immense increase of banks and banking capital took place, and the gentlemen employed to prepare drafts of bills of incorporation, thought it prudent to provide for the removal of every scintilla of doubt as to the renunciation of wives ; and in every charter for a bank granted thereafter, this prudent clause has been inserted. It is likely that I labor under an error in this respect, since I differ from the opinion of the court ; but the conduct of the legislature has appeared to me an evidence of their considering the renunciation of wives as perfectly consonant with good morals and sound policy. For if it were otherwise, why should they open so many doors, or multiply the facilities to the commission of acts destructive of morality and the good of society ? What is the difference between a wife beggaring herself by aiding her husband in borrowing from a bank or from a capitalist ? I admit that the sole circumstance of the legislature authorising renunciations, might be considered as a mere relaxation of an admitted general principle ; but the genius of the American people, the vast extension of commerce and universal practice, repel the idea that these renunciations are viewed by the people as immoral or impolitic.

If a farther illustration of this be necessary, we have a forcible one in the conduct of the legislature, when this tribunal announced its opinion on the first hearing in the

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present case. An electric panic suddenly pervaded the community, and created a general sentiment of alarm and insecurity. As in desperate cases, desperate remedies are resorted to, a bill was introduced before the judgment of this court could have become final, if it had not been prevented by an application for a re-hearing.

This bill is evidence of the excitement under which it was received and enacted. The general assembly rebuilt what they thought this court had pulled down. On this part of the case, I conclude the District Court did not err in considering the right of wives to renounce, as one established for their benefit alone, and which, consequently, they are at liberty to waive.

It remains to examine, whether this renunciation be forbidden by the article of the Louisiana Code, which forbids a wife to bind herself with or for her husband.

It is said it does; because, by renouncing, she *binds* herself not to claim what she has renounced. I believe this a very forced construction. Our code enumerates the modes of *creating*, and of *extinguishing* obligations. *Payment* and *release* are not found among the former, but among the latter. A release and renunciation are not similar, but identical. Yet if the proposition contended for be correct, payment and release, or renunciation, are the means of creating obligations.

If A and B be the debtors of C, and he receives the debt from A, and releases that of B, he binds himself to A not to demand the money he has received, and to B, not to claim the debt he released or renounced.

He who receives or releases what is due him, is not bound to forbear asking for what he has released or received, more than he is bound to forbear asking what never was due him.

It is true, the deed by which payment is acknowledged, or the release or renunciation made, may, and does very often contain a clause by which the former creditor promises never to claim again; but such a clause is merely one of style: I say, the release or renunciation may be effected by an

engagement never to claim. In such a case, it is a mere release. I admit that one may beggar himself as easily by renouncing a right as by creating an obligation. But these means are not *identical*, but *similar*; *similis non idem*.

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The first is necessarily limited, the other is not so. The release cannot exceed the right: the obligation may be beyond the means.

The Louisiana Code went into effect in 1825; between that year and 1828, it never was imagined that the article prohibiting a wife to bind herself with or for her husband, prevented her renunciation. It cannot be denied that the opinion that the repeal of the laws of Spain did not abrogate the wife's right of renouncing her tacit mortgage, was almost universal; that there is neither a notary in the city, nor a parish judge in the country, who was not in the habit before the decision of this tribunal, in the present case, of receiving acts of renunciation.

The extraordinary means resorted to by the legislature to release the people from the danger attending the principles which the reversal of the judgment of the District Court will create, is to me a convincing proof that they thought their intention had been mistaken by this tribunal.*

I am of opinion the judgment ought to be affirmed, with costs.

*An Act to limit the time in which married women, aged above twenty-one years, may retract renunciations made by them in favor of third persons, of their matrimonial, dotal, paraphernal and other rights; and to authorise them in future to make valid renunciations.

SECTION 1. *Be it enacted, by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That all married women, aged above twenty-one years, who, with the consent of their husbands, have, by act passed before a notary public, voluntarily renounced, in favor of third persons, the mortgage which they had for the restitution of their matrimonial, dotal, paraphernal and other rights, shall have the right of retracting the said renunciations during only the forty days which will follow the promulgation of the present act, all laws or parts of laws, to the contrary notwithstanding.

SECTION 2. *Be it further enacted, etc.,* That from and after the promulgation of this act, married women aged above twenty-one years, shall have the right,

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renounce, in favor of third persons, their matrimonial, dotal, paraphernal and other rights; *provided*, that the notary public, before receiving the signature of with the consent of their husbands, by act passed before a notary public, to any married woman, shall detail in the act, and explain verbally to said married woman, out of the presence of her husband, the nature of her rights, and of the contract she agrees to.

SECTION 3. *And be it further enacted, etc.*, That all laws and parts of laws, contrary to the provisions of this act, be and are hereby repealed.

Approved March 27, 1835.

I N D E X

OF

PRINCIPAL MATTERS.

ACTION.

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1. An action in which the plaintiffs simply allege themselves owners of property in common with the defendants, cannot preclude the latter from disputing the rights of the former, and setting up title in opposition to the claim made. It is, in this respect, an action of revendication, and not of partition, and involves the prescription of ten and twenty years.

Davis's Heirs vs. Elkins et al. 135

2. In a possessory action to regain a space of ground behind the levee, and between it and the public street in the city of Lafayette, the plaintiff claimed as riparian owner, and having possessed as such for more than a year, the *locus in quo* supposed to be susceptible of private ownership: *Held*, that the question, whether it be in fact the plaintiff's property, or has been *destined to public use*, is one of title which cannot be inquired into. No testimony is admissible except as to the fact of possession and disturbance..... *Gleisse and Holland vs. Winter*, 149

3. A corporation can maintain a petitory action to remove nuisances and clear the banks of rivers, by showing that the land occupied is destined to public use..... *ib.*

4. In a petitory action, the vendor of the plaintiff cannot be made a party on an allegation of the defendant that he obtained his title fraudulently from the government under the pre-emption laws.

Jones et al. vs. Purvis et al. 288

5. So in a petitory action, the record and judgment of eviction in a possessory action between the same parties and their vendors and warrantors about the same land, cannot be given in evidence..... *ib.*

6. An action for the breach of a contract of passage made by the wife with the captain of a ship, will be considered as *personal*, under the article 107 of the Code of Practice, in which the husband has the right to prosecute and recover damages in his own name..... *Holmes vs. Holmes*, 348

ACTS, PUBLIC AND PRIVATE.

1. If no original whatever of a notarial act can be found in the office of the notary, a copy certified by him, with his seal appended, would be still admissible in evidence, and have effect, because, it must be presumed from the official character of the notary, to be a copy of an original which once existed..*Montreuil et al. vs. Pierre et al.* 356
2. The loss or destruction of the original act will rather be presumed or supposed, than that the notary was guilty of forgery in giving a certified copy of an act that never existed..... *ib.*
3. The genuineness of instruments under private signature depends on proof; and in all cases where they are established by legal evidence, instruments signed by the party making his *ordinary mark*, when he is incapable of writing his name, ought to be held as written evidence of what they contain.....*Tagiasco et al. vs. Molinari's Heirs*, 512
4. The force and effect to be given to instruments which have for signatures only the *ordinary mark* of the party, depend more upon rules of evidence than the *dicta* of law, relating to the validity of contracts required to be made in writing..... *ib.*
5. According to the rules of evidence as adopted in this state, the ordinary mark of a party to a written contract, places the proof of it on a footing with all private instruments in writing..... *ib.*
- 6 The general rule is, that proof of the signatures of the witnesses to an instrument of writing under private signature, when they are dead, does not establish that of the obligor, or principal..... *ib.*
7. Proof of the genuineness of an instrument under private signature, signed by the party making her ordinary mark, or cross, and attested by two witnesses, may be made by parole evidence when the witnesses and party are dead, by proving the witnesses' signatures, and that they were respectable and of good character, who would not attest a forgery..... *ib.*
8. The party who puts the initials of his name, gives a kind of approbation to the instrument on which he writes them, and is binding on him. This is not materially different from an ordinary mark..... *ib.*
9. If a party deny his signature to an act, or private instrument of writing, or alleges it is counterfeited, it must be proved by witnesses who have seen him sign the act, or know his signature from having frequently seen him write. Proof by experts, or comparison of handwriting, may also be received.....*Plicque and Lebeau vs. Labranche et al.* 559
10. Proof by witnesses of the acknowledgment of a signature by the party sought to be charged, is inadmissible, when he expressly denies or alleges it is counterfeited..... *ib.*

11. The place at which an act was passed is not essential; and the party may well show, by the testimony of a witness, that the instrument was in fact executed at a different place than that stated in it, in order to rebut the presumption of forgery or perjury, arising from the circumstances of the case.....*Keys and Wife vs. Powell et al.* 572

APPEAL.

1. After a suspensive appeal has been allowed, the court below is divested of all jurisdiction in the case.....*Longbottom's Ex'rs. vs. Babcock et al.* 44

2. Defects in judicial proceedings, such as want of appearance, judgment by default, or misconduct and neglect of the curator *ad hoc*, &c., can only be remedied by an appeal, and not by an action of nullity.

Seymour vs. Cooley, 72

3. An appeal does not lie, to an order allowing an opposition to be filed, when the final action of the court may render the appeal unnecessary.

Garcia & Buyo vs. Their Creditors, 93

4. When all the documents mentioned in the certificate of the clerk to the record, are not produced in the Supreme Court, the appeal will be dismissed.....*M-Millan vs. Gibson et al.* 118

5. An appeal from an order sustaining the opposition of the attorney of absent creditors, will be dismissed as a case not appealable.

Riker vs. His Creditors, 160

6. Where the appellants prayed the affirmance of the judgment appealed from, and the adverse party not appearing to dismiss the appeal, the judgment was affirmed at the costs of the party appealing.

Freret et al. vs. Marigny, 414

7. The appellant is bound to cite in the appeal, all the parties before whom, contradictorily in the inferior court the judgment was obtained, which is appealed from.....*Guerin et al. vs. Bagneries,* 471

8. So the plaintiff who appeals is bound to cite both the defendant and his warrantor, before the appeal can be heard. Further time will be allowed to cite in all the parties..... *ib.*

9. The Supreme Court will not on a rule to show cause, examine the order of an inferior judge refusing to grant a *mandamus* as prayed for. The only legitimate mode of revising the orders or judgments of inferior courts is by appeal.....*Bayon vs. Mayor et al.* 578

ATTACHMENT.

1. Money due to the plaintiff is a proper object of attachment by any of his creditors; even the defendant who owes it, may attach the amount of

a judgment and execution against himself, in a suit which he may institute against the plaintiff for a sum equal or greater in amount. PAGE.

Richardson vs. Gurney, 285

2. Where money owing by the defendant in execution is deposited in the sheriff's hands, and attached by the former in a new suit against the plaintiff, it will not be considered as money made on the execution, but only pledged for the sheriff's indemnification..... *ib.*

ATTORNEY.

1. An attorney in fact who sues in his principal's name, to recover a debt due and owing to him, is a competent witness to prove the plaintiff's demand..... *Zino vs. Verdelle*, 51

2. An attorney in fact of the heirs of a deceased brother, who is empowered to *compound matters* concerning the succession, has authority to compromise with a co-heir for his share by assuming payment on the part of the other heirs, of a note held by this co-heir against the succession, after it is barred by prescription..... *Lewis vs. Lewis's Heirs*, 101

ATTORNEY FOR ABSENT HEIRS, &c.

1. The fee or allowance to the attorney of absent heirs, and the attorney of the curator of an estate, should be graduated by the value of the services rendered..... *Stein vs. Bowman, Curator, &c.* 281

2. The counsel fees for settling an estate, cannot be charged to the portion in which the deceased had only a usufruct.

Millaudon vs. Cayus, Executor, &c. 306

BAIL.

1. If the principal in a bail bond dies before judgment is rendered against the surety, so as to put it out of the power of the latter to surrender him in execution, the bail will be discharged..... *Wakefield vs. McKinnell*, 449

BANK CHARTER.

1. Where stockholders have subscribed and complied with all the requirements of the charter, they are thereby entitled to all the rights of stockholders, which cannot be divested by amendatory acts of the legislature, accepted only by the president and directors of the institution.

Boisdere and Goulé vs. Citizens' Bank, 506

2. The acceptance of an amended charter by the president and directors, which excludes a class of stockholders, who are colored persons, when the original charter gives no authority to the board to obtain such a modification, does not operate a forfeiture of their stock, or divest them of their rights as stockholders..... *ib.*

BILLS AND NOTES.

1. In an action by the acceptor of a bill against the drawer, who directed it to be charged to account of the steamer *Walter Scott*: *Held*, that the agency of the drawer is apparent on the face of the bill, by directing it to be charged to account of the steam-boat, and which negatives the idea that he was to be personally bound.....*Maier et al. vs. Overton*, 115

2. A person having a right to draw a bill of exchange, in consequence of engagements between him and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and not as coming within the exception, that the drawer, without funds in the hands of the drawee, is not entitled to notice of non-acceptance and dishonor of his bill.
Bloodgood et al. vs. Hawthorn, 124

3. The drawer of a bill, when sued by the holder, is entitled to notice of its non-acceptance and dishonor; or by averments in the pleadings, and notice at the trial, of the intention of his adversary to hold him liable, on the ground that he drew without authority, and without funds in the hands of the drawee, notwithstanding the want of notice..... *ib.*

4. When the parties to a note secured by a mortgage, have not been put in default by a demand and protest for non-payment, and there is no stipulation that the party failing to comply with the agreement, shall be deemed to be in default by the mere act of failure, under the article 1905 of the Louisiana Code, interest cannot be demanded.
Consolidated Association Bank vs. Foucher et al., 476

5. Where the defendant is indebted to a commercial house, and executed two notes in liquidation of his account, which were passed to his credit, which were negotiated and returned protested, and taken up by the firm to whom he gave them, they are not thereby novated, and may be transferred to *bonâ fide* holders, as evidence of an existing debt.
Yard & Blois' Syndic vs. Srodes, 479

BOND.

1. Gold and silver only can be legally tendered in payment of debts. So, a twelve months' bond, taken for the price of adjudication of property of a debtor, seized and sold by a creditor, is nothing more than a bond and security with mortgage on the property sold; and which does not discharge the original obligation or judgment.....*Offutt et al. vs. Hendsley et al.* 1

CARRIER AND FREIGHTER.

1. As a general rule, the carrier is bound to prove the casualty or *vis major* which occasioned the loss or deterioration of the property which he undertakes to convey and deliver in good condition, according to the bill of lading*Shackleford vs. Wilcox et al.* 33

2. When damaged goods are delivered, and received by the consignee without objection, particularly where the damage is apparent on simple inspection, a rigid enforcement of the rule requiring the carrier to prove the damage was occasioned by *vis major*, might operate with injustice. There is an apparent compliance on his part with the conditions of the bill of lading, and by receiving the goods, the consignee becomes liable for the freight..... 33

3. A steam-boat is not liable for part of a passenger's baggage, when separated from the rest; or for the contents of a sealed letter or packet, when stolen, which may be delivered to a passenger on board, at any place the boat may happen to stop...*Wilcox & Fearn vs. Steam-boat Philadelphia* 80

4. The owner of a sealed letter or packet, is under no obligation to pay for its transportation, when given to a passenger, and the steam-boat is not liable for its safe keeping..... *ib.*

5. Before the bill of lading comes into the hands of the consignee, the shipper may, if he chooses, vary or modify the contract between him and the carrier or freighter, by a written declaration that part of the cargo was not in good order as specified in the bill of lading.

Hall et al. vs. Ship Chieftain et al. 318

CITATION.

1. The occasional absence of the appellee from the state, does not dispense with the service of citation at his domicil.....*Cooley vs. Seymour*, 214

2. An affidavit, showing that at the time of service of the citation on the counsel for the appellee, the latter *resided* in another state, will make the service good..... *ib.*

COMMUNITY.

1. Where the property of a community is adjudicated to the surviving husband as *common*, through error, it being the wife's exclusive or paraphernal estate, and this sale is ratified by the heirs on having their respective portions set off to them coming from the deceased wife: and although the sale is afterwards annulled, at the suit of one of the heirs, yet purchasers and mortgagees, deriving title from the husband in the meantime to this property, will be protected and their titles secured.

Foutelet et al. vs. Murrell, 291

2. A marriage contract entered into in France, where no community of acquests and gains existed by law, and none were stipulated, yet when the parties removed to Louisiana, such a community took place by operation of law, in reference to the property acquired here.....*Tourné vs. Tourné*, 453

3. The wife has an action against the heirs of her husband, to recover her share of the property of the community alienated by him in fraud of her

rights ; but when she claims this right, in addition to a judgment of separation from bed and board, and fails in the first, she is not entitled *then* to any remedy in relation to the property. 453

4. The community of acquests and gains is terminated by the death of one of the parties. The survivor has no right to sell the whole property. The heirs of the deceased partner, if they accept the succession, either tacitly or expressly, become joint owners ; and if the surviving partner sells he can convey no greater right than he has himself... *German vs. Gay et al.* 580

5 Where the surviving partner sells slaves or other immoveable property of the community, his vendee will become co-proprietor with the heirs of the deceased partner..... *ib.*

6. The distinct interest of the parties to the community, attaches at the dissolution of the marriage, subject to the right of the wife or her heirs to renounce and be exonerated from payment of the community debts..... *ib.*

7. The heirs of a deceased partner in the community of acquests and gains having a joint interest, can maintain an action for their interest against a third possessor of a slave alienated by the husband after the dissolution of the community..... *ib.*

8. The husband's authority as head of the community, ceases at the dissolution of the marriage..... *ib.*

9. The District Court has jurisdiction of an action of partition of a community..... *ib.*

COMPENSATION.

1 The defendant cannot set up a claim against the adverse party for unliquidated damages on a contract, in compensation for a liquidated demand..... *Hoffman vs. Pontchartrain Rail Road Company,* 20

2. Compensation or payment must be pleaded, to authorise the defendant to offer evidence, showing the plaintiff had received various sums of money, to a greater amount than he sues for..... *Mortimer vs. Trappan's Executor,* 108

CONFESSION.

1. The confession of an unhappy parent, who is threatened with a suit, drawn from him by a letter denouncing his son for forgery, and charging him with forging the father's signature to certain notes sold and delivered to the plaintiff, will not bind the party making it.

City Bank of New-Orleans vs. Foucher, 405

2. A judgment may be taken by confession of the defendant, without a trial, for the sum admitted to be due and owing, and the cause continued for trial for the part disputed..... *Parsons et al. vs. Suares,* 411

3. But judgment by confession can only be taken in favor of the plaintiff, to whom the debt is acknowledged to be due and owing..... *ib.*

CONSTITUTIONAL LAW.

1. A constitutional law, which prohibits or takes away certain privileges and rights previously granted, or limits their exercise, causes *damnum absque injuria*; but if the law is unconstitutional, it can have no effect, and can cause neither damage nor injury.....*McGuire vs. Mead*, 311

2. The act of the territorial legislature, passed 22d April, 1806, requiring courts of justice to stop all proceedings against members of the legislature, in actual attendance on legislative duty, and claiming their privilege, is not repealed or superseded by the adoption of the constitution of Louisiana.

Bradshaw et al. vs. Dickson, 485

3. If an act amendatory of the original charter of a bank, involves the destruction of a vested right, or impairs an obligation, it will be declared unconstitutional and void.....*Boisderé & Goulé vs. Citizens' Bank*, 506

CONTINUANCE.

1. A continuance should be granted on an affidavit, to obtain the testimony of a subscribing witness, to show that the bill of sale under which the party claims, was witnessed by him, and executed at a different place from that stated in the body of it*Keys and Wife vs. Powell et al.* 572

CONTRACT.

1. There is a privity of contract between the surety of a debtor and the creditor, which compels the latter to preserve his rights against the debtor for the benefit of the former.....*Offutt et al. vs. Hendsley et al.* 1

2. There is no privity of contract between the vendee of a mortgage and the creditor of the original mortgagor..... *ib.*

3. An assumpsit by a deceased vendor to refund the price of a slave which died of a redhibitory disease, is binding on his heir.

Noirette, f. w. c. vs. Diggs's heirs, 172

4. There is no law requiring a party claiming damages for an injury resulting from the non-performance, or unskilful performance of a contract for work and labor *to be done*, to first put the party delinquent *in morâ*, before he can prove his damages.....*Morton vs. Pollard*, 174

5. Where a workman makes a piece of machinery to order, and it is alleged by the employer that it was unsuitable for the purpose intended, without objection that it was unskilfully made, the former will be entitled to recover the *price* of his work on the contract.....*Leeds vs. Zeringue*, 201

6. A promise by a party to indemnify and save harmless a person who, at his request, sleeps in and guards his store at night, *is binding*, and will authorise a jury to give damages sufficient to pay the expenses of a criminal

prosecution incurred by this person, in consequence of acceding to such promise.....*Dexier vs. Bougnon*, 250

CORPORATION.

A corporation can maintain a petitory action to remove nuisances and clear the harbors and banks of rivers, by showing that the land, or place occupied, is a public place, destined to public use. *Gleisse & Holland vs. Winter*, 149

2. The fact of a rail-road company having possessed themselves of a strip of land through the land of the defendants, and constructed a road through it, does not preclude them from instituting suit afterwards, and having the land adjudged to them, on assessment and payment of the damages sustained by the owners, according to the provisions of the act of incorporation.....*Carrollton Rail-Road Company vs. Avar et al.* 205

3. Where the president and directors of a company are appointed commissioners to perform a certain trust, they act in the latter capacity, and are responsible for their acts *as commissioners*, and their capacity as such exists *after* their offices of president and directors may have expired.

Lallande vs. President and Directors of Louisiana State Insurance Co. 326

4. Where commissioners are appointed to open subscription books for the stock of a company on a certain day, and keep them open until the stock is taken, the time during which they are to keep the books open is unlimited ; and the commissioners are responsible for their acts until the subscription is filled..... *ib.*

5. Corporations are intellectual beings, distinct from the persons who compose them, and are creatures of the law. They can act only according to their organization, in the form or manner pointed out by their charters, and the laws of the land.....*Peirce et al. vs. New-Orleans Building Co.*, 397

6. The estates and rights of a corporation belong to the whole body, and none of the individuals who compose it can dispose of any part of them. The act of the majority of the corporators, legally expressed, is the act of the whole ; and no contract is legally binding on the corporation, which is not binding on every member of it..... *ib.*

7. But the will or assent of a majority of the stockholders, taken separately, and not in full meeting, is not regarded in law as the will of the corporation itself..... *ib.*

8. So where the assent of a majority of the stockholders of a building company was expressed in relation to a certain transaction concerning the corporation, not in a meeting of stockholders, but by each one separately, and at different times, and evidenced, not by the minutes of the corporate proceedings, but by a separate paper in the possession of a committee : *Held*, that the proceeding was null and void, as containing no legal evidence

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of the consent of the corporation either according to its charter, or the general principles of law.....	397

CORPORATION OF NEW-ORLEANS.

1. Where property is seized for the violation of a city ordinance, although the seizure was lawful in its commencement, yet if the city authorities fail to pursue the requisites of the law, in advertising and disposing of the thing seized, the act of the officer making the seizure, will be considered as a trespass *ab initio*, for which his constituents are responsible.
Baumgard vs. Mayor et al. 119
2. The case of the corporation receiving runaway and offending slaves in the city jail, and working them in the chain-gang on the streets, is in the nature of a bailment in which the bailor is alone benefited; and the corporation is only bound to use ordinary vigilance in keeping them.
Chase vs. Mayor et al. 343
3. Where the corporation of New-Orleans received a runaway slave, and put him to work in the chain-gang, on the public streets, and he made his escape from the guards, and it was in proof that the owner's agent was notified of it the next day, and no neglect or want of the ordinary vigilance appearing: *Held*, that the corporation was not liable..... *ib.*
4. Licenses granted to a person by the mayor of the city of New-Orleans, in pursuance of certain city ordinances, to sell fruit at stands or stalls on the levee, confer only personal privileges which cease at the death of the grantee, although the period for which the license is given has not expired.
Brunetti vs. Mayor et al., 430

CURATOR.

1. The oath of the son, as the agent of the plaintiff, is sufficient to obtain an order of court appointing a curator *ad hoc* to the defendant, in a case where suit is pending.....*Seymour vs. Cooley*, 72
2. A curator *ad hoc* is to be appointed to an absentee, in a suit which is instituted and pending. The citation in such a case must be served on the curator *ad hoc*, against whom contradictorily the proceedings must be carried on to final judgment..... *ib.*
3. The 57th article of the Louisiana Code, expressly requires that a suit be first instituted and pending, before the appointment of a curator *ad hoc* is to be made..... *ib.*
4. The general provisions in the Code of Practice, for the appointment of curators by the Probate Court, do not repeal the particular one requiring all courts to protect the interests of absentees in suits pending before them, by the appointment of a curator *ad hoc*..... *ib.*

5. A curator *ad hoc*, appointed by the court to an absentee, may employ counsel to defend the interests of such absentee, who is entitled to a just compensation for his services, to be paid by the absentee, whose interests he defended.....*Cooley vs Beauvais*; 85

6. But a curator *ad hoc*, has no right to obtain from the court, taking cognizance of the original action, a summary and *ex parte* order on the absentee, fixing the compensation for his services, to be taxed as part of the costs. The court cannot grant such order, without hearing the party concerned..... *ib.*

7. When a curator *ad hoc* is a sworn attorney of the court, he will be presumed to have done his duty, when the contrary does not appear.
Cooley vs. Seymour, 274

8. The curator *ad hoc* is responsible for his neglect to the party whose interests he is appointed to defend, and his faults or misconduct are not to be visited on the adverse party..... *ib.*

DAMAGES.

1. In a case of wanton and illegal arrest of plaintiff's horse and dray, and detention of them, without cause by the defendant, it will be considered as evincing such obstinate determination to take justice into his own hands, as will authorise a jury to inflict damages in the shape of smart money.
Summers vs. Baumgard, 161

2. Ten per cent. damages will not be awarded in an appeal case, which in its origin is one of litigation and uncertainty.
Noirette, f. w. c. vs. Diggs's Heirs, 172

3. Where a party is sued for loss and injury done to goods by his slave, the measure of damages should be the difference between the value of the goods before, and that after the injury done to them. He cannot be made liable for the profit, the plaintiff (who was a tailor) might have made on them by his industry in making them into clothes....*Guerrier vs. Lambeth*, 339

DEPOSIT.

1. The depositor, to be entitled to his right of privilege, must make proof of the identity of the thing deposited; for it is of the essence of deposit that the depositary should be bound to keep the thing deposited, and restore it in kind to the depositor.....*Longbottom's Executor vs. Babcock et al.* 44

2. A sum of money found in the store of a deceased agent, making part of a sum put into his hands to be disbursed on account of his principal, does not entitle the owner to a privilege on the succession of the deceased, as in case of a special deposit, when there is no evidence to show that this sum is the *same money* received by the deceased agent..... *ib.*

3. A packet or sealed letter with bank notes enclosed, delivered by a passenger to the clerk of a steam-boat, for safe keeping, is simply a contract of deposit between *them*, in which the depositary is only bound to use ordinary care.....*Wilcox & Fearn vs. Steam-Boat Philadelphia*, 69

DELEGATION.

1. Delegation includes a novation by the extinction of the debt due from the person delegating, and the obligation contracted by the new debtor to the common creditor.....*Bonilla, syndic, &c. vs. Merle et al.*, 216

2. Delegation contains a double novation where the person delegated is the debtor of the person delegating: the former, to acquit himself of his obligation to the latter, contracts a new obligation to the creditor. Novation takes place, both of the obligation of the person delegating, by giving a new debtor, and of the person delegated, by the new obligation he contracts with the common creditor..... *ib.*

3. If the person delegated be not debtor of him delegating, still if he obligates himself to pay, he is bound, and cannot resist payment, only saving his recourse against the person delegating him..... *ib.*

4. So, where A requested B, his factor, to pay C one thousand nine hundred and eleven dollars, who replies he will *when put in funds*, and advises A he has promised C, the common creditor, to do so; but the latter not getting his money as soon as expected, applied several times to A, his original debtor, to remit him the money, and does no act in the meantime to release B from his conditional promise to pay him: *Held*, that it was a delegation of a new debtor from A to C, and B became absolutely bound on getting in funds..... *ib.*

5. The creditor, by the promise of the person delegated, has two bound, to either of whom he may resort for payment. If the original debtor makes payment after delegating another, he will have his recourse against the latter; but until payment, his right against the delegated debtor to the creditor, is suspended..... *ib.*

6. When B, the defendant, was put in funds, he became absolutely bound to C; he might have again become so to A, if it was shown the latter had paid C..... *ib.*

DISCONTINUANCE.

1. Neither party to a suit is at liberty to dismiss or discontinue his action which is not exclusively his own, and avert a judgment which his opponent has a right to obtain.....*McDonough vs. Copland*, 308

2. So where a party publishes a monition, under the act of 1834, for the assurance of titles acquired at judicial sales, and an opposition is filed to the homologation of the sale, the plaintiff in the monition cannot discontinue or dismiss his suit..... *ib.*

DIVORCE.

1. The wife can obtain a divorce *a vinculo matrimonii* from her husband when it is in proof that he has lived in open adultery with another woman, and there is no evidence at the institution of suit, that a reconciliation has taken place..... *Adams vs. Hurst*, 243

2. The statute of 1827, relative to divorces, authorises a divorce on the part of the wife, when the husband keeps a concubine in the common dwelling, or keeps her publicly in any other house. It is also held, that living with her at *her own house*, is within the meaning of the law..... *ib.*

DOMICIL.

1. An exception to the general rule, that defendants have a right to be sued in the parish where they have their residence and domicil, has been made by the court, in cases necessarily growing out of the provisions of law, in relation to joint obligors who are absolutely required to be sued together *Millaudon vs. Turgeau et al.* 547

2. The necessity of the case does not require that obligors *in solido* should be sued together. To create a new exception in favor of such contracts, would be a violation of positive law..... *ib.*

3. Defendants sued as endorsers, and bound *in solido* each for the whole sum, have a right to be sued at their respective domicils, and separately when they reside in different parishes. The court cannot create an exception in such cases, which is done when the obligation is joint only..... *ib.*

ENDORSER.

1. Where the notice of protest is left with a black man, who appears to be a servant in the house of the endorser, and who stated at the time that the latter was still in bed, it is insufficient to bind the endorser.

Dufour vs. Morse et al., 333

2. The fact of the endorser taking a mortgage from the maker of a note, to indemnify him against loss, does not dispense with due and legal notice of protest for its non-payment to be given by the holder of the note..... *ib.*

ERROR.

1. Errors assigned as apparent on the face of the record, that interest was allowed on an unliquidated claim ; that the land was ordered to be seized and sold, to pay the value of the improvements allowed to the party evicted ; and finally, that compensation was made to the curator *ad hoc*, all in the same judgment, are well taken..... *Cooley vs. Seymour*, 274

2. The appellant cannot assign for error apparent on the face of the record, that the judgment was signed before the expiration of three judicial days from its rendition..... *Minor et al. vs. Lanbelle*, 323

1. The provision of the Civil Code, 354, article 57, which gives to the buyer, in case of eviction, the increased value of the property between the time of sale and the period of eviction, which is to be restored by his vendor in warranty, is suppressed and repealed by the adoption of the Louisiana Code.....*Morris vs. Abat et al.*, 552

2. In case of eviction of the buyer, the seller is only responsible for the restitution of the *price*; the fruits or revenues, when the vendee has to return them to the true owner, and the costs of suit and damages, when the vendee has suffered any over and above the price he has paid..... *ib.*

3. The marshal or sheriff is responsible in damages to the purchaser who is evicted for selling a slave, or other property, without sufficient authority. These officers warrant the correctness and legality of their own acts, and if by their illegal acts they cause damages, they are bound to make reparation. *ib.*

EVIDENCE.

1. Evidence will not be received to show that a previous mortgage on certain property has been paid off, when there is no allegation of payment in the petition; nor to establish fraud against the other creditors, in executing the mortgage by the debtor, when the action of rescission is prescribed by the lapse of one year.....*Dixon vs. Emerson*, 104

2. In an action to annul a mortgage made in fraud of creditors, when the pleadings admit the existence of the act importing the mortgage, it is unnecessary to offer it in evidence. The only question for the jury is, was it made in fraud of creditors?..... *ib.*

3. In an action on a special agreement for the price of putting up a mill, evidence of the value of the work and labor done on it will not be admitted, the parties having agreed on the price.....*Morton vs. Pollard*, 174

4. Where the consideration of a mortgage is impeached by the third possessor of the mortgaged premises, *prima facie* evidence of the genuineness inherent in and resulting from the contract of mortgage itself, coupled with proof of advances of money, &c. to the mortgagor by the original mortgagee, will authorize the latter to recover against such third possessor on his mortgage.....*Deverges vs. Lanusse*, 177

5. An erased credit on a note in the possession of the creditor, is not conclusive proof, but may be repelled by evidence to show that the credit was erroneously endorsed in the first instance.

Garnier et al. vs. Peychaud's Executor, 182

6. A note with the signature of the debtor erased or crossed, is still admissible in evidence on the part of the creditor to show he has paid it for the former, and is entitled to be refunded out of his estate. The erasure

furnishes a presumption in favor of the debtor, but it is not a presumption *juris et de jure*. It may be entirely repelled by showing that the signature was erased through error or inadvertency..... *ib.*

7. But a note to which the deceased was no party is *per se* inadmissible in evidence to charge his estate with its amount. Evidence, however, to show that the proceeds of it, when discounted, went into his hands, is admissible..... *ib.*

8. The order or decree of a court in another state appointing guardians to minors, for the special purpose of protecting their rights and interests in a certain suit pending in Louisiana, will not be received as evidence of a general authority to sue for and recover the property of a succession due to the minors here, and compel the administration to account.

Douglas and Wife, vs. Edwards and Wife, 234

9. But if the powers granted to guardians of minors by the decree of a court in another state, confers full authority on them in legal form to represent the minors in all things relating to their property here, such decree would be full evidence of authority in the guardian to act..... *ib.*

10. The record and judgment of a suit against the plaintiff by a mortgage creditor, under which a tract of land sold by the former to the defendant, was seized and sold, is admissible in evidence in an action for the price, under the plea of *eviction*..... *Landry vs. Gamet, 246*

11. Parole evidence is admissible to prove filiation and heirship generally; but when it is shown that there exists record, or written evidence, or its existence is rendered highly probable, it ought to be produced, especially, where several persons, strangers to each other, claim the succession.

Stein vs. Stein's curator, 277

12. The certificate of the American consul residing in a foreign country, attesting the official character of an officer of that country, before whom the depositions of witnesses are taken, is insufficient to make them legal evidence..... *ib.*

13. It is not the duty of an American consul to attest the signatures of public functionaries in the countries where they reside; and in order to give their certificates the form of testimony, it will be necessary to show that this is one of their consular functions..... *ib.*

14. In a petitory action, a judgment of eviction of the vendor of the plaintiff, obtained before he sold the land, by the defendant, when the former was his tenant, and attempted to hold the land in dispute in his own right, will not be received in evidence, or considered as *res judicata* in favor of the defendant's right to the land..... *Jones et al. vs. Purvis et al., 288*

15. The general rule is, that written titles form full and conclusive proof between the parties; but where a third person alleges nullity of a sale for some cause, parole evidence is admissible under such allegation.

Macarty vs. Bond, administrator, 351

16. The affidavit of the defendant annexed to his answer that his signature on the note in suit is forged and counterfeited, will not be permitted to go to the jury as *evidence*, when not made the basis of some preliminary or interlocutory proceeding.

City Bank of New-Orleans vs. Foucher, 405

17. The rules of evidence by which courts of justice in this state have been governed, since the change of government have been borrowed in a great part from the English law, as having a more solid foundation in reason and common sense *Tagiasco et al. vs. Molinari's Heirs*, 512

18. According to the rules of evidence as adopted in this state, the ordinary mark of the party to a written contract, places the evidence of it on a footing with all private instruments in writing..... *ib.*

19. A certified *copy* from a *copy* of a Spanish record of the judicial proceedings and adjudication of property, ordered to be kept in the archives of the Spanish government at Baton Rouge, is legal and admissible evidence of the matters to which it relates. Only a copy of the judicial proceedings, according to the practice of the Spanish government, was kept in relation to the administration of estates where the property was situated in different jurisdictions..... *Vidal's Heirs vs. Duplantier*, 525

20. In an action by the heirs of a surety in a paymaster's bond against a co-surety to compel him to pay his proportion of the sum for which all the sureties were condemned *in solido*, by a judgment of the United States District Court: *Held*, that the record and judgment of said court is domestic, although not examinable in the state courts; and not being revised or reversed by the Supreme Court of the United States, is *res judicata* and conclusive evidence against each and all of the parties, as to all things adjudged by it, and admissible in evidence..... *Rochelle's Heirs vs. Bowers*, 528

21. Evidence of the acknowledgment of a party who is sought to be charged, or rendered liable, is the weakest species of evidence; for the witness who testifies cannot be convicted of perjury if he swears falsely; and it is almost impossible to contradict him.

Plicque & La Beau, vs. Labranche et al. 559

22. If a party deny his signature to an act or private instrument of writing, or alleges it is counterfeited, it must be proved by witnesses who have seen him sign the act, or know his signature from having frequently seen him write. Proof by experts, or comparison of hand writing, may also be received..... *ib.*

23. Proof by witnesses of the acknowledgment of a signature by the party who is sought to be charged, is inadmissible, when he expressly denies, or alleges it is counterfeited..... *ib.*

24. The article 325 of the Code of Practice modifies and supersedes the provisions in the Louisiana Code, article 2241, which allows proof of signatures by witnesses, as in other cases..... *ib.*

25. Parole evidence is inadmissible to prove the simulation of a sale, and that the property in question was conveyed as a security to indemnify the vendee against certain endorsements, from which he has since been released.

Purdon vs. Linton's Executor, 563

26. But parole evidence is admissible to explain an ambiguity arising extraneous of the written instrument, to show that certain property alluded to in a counter-letter was the sole property of the vendor, and must have been that which formed the subject of the sale and conveyance sought to be rescinded..... *ib.*

27. A written instrument which does not of itself, prove a contract of sale of immoveable property, cannot be rendered sufficient by the admission of parole evidence to explain and enlarge its obligations..... *ib.*

28. A letter written by the vendee to the vendor of certain property, rendering it quite clear that the vendee did not intend really to purchase the property, but merely to hold it as a nominal purchase to secure him against certain endorsements for the vendor, will be received as evidence of the true understanding of the parties..... *ib.*

29. Parole evidence is admissible to prove that a written instrument was executed in a different place from that at which it purports to have been passed.....*Keys and Wife vs. Powell et al*, 572

30. The place at which an act was signed, is not essential, and the party may well show by the testimony of a witness, that the instrument was in fact executed at a different place, in order to rebut the presumption of forgery or perjury arising from other circumstances in the case..... *ib.*

31. The record and judgment of a suit by another party against the defendants, condemning them to pay damages occasioned by the plaintiff's conduct whilst in their employment, is admissible in evidence to prove *rem ipsam*, i. e., that the money was recovered.

Davis vs. Louisiana Tow-Boat Company, 575

EXECUTOR AND ADMINISTRATOR.

1. The article 1004 of the Code of Practice, requires that opposition should be made within *three days* to an executor's account after filing it; but it does not prevent opposition from being made afterwards, if made before judgment of homologation.

Longbottom's Executors vs. Babcock et al. 44

2. Executors are legally incapable of purchasing the property of successions administered by them, at a sale provoked by themselves; and cannot gain at the expense of the estate they administer..... *ib.*

3. Executors are responsible for all the debts in the inventory not accounted for. They are bound to collect and account for all sums due to the estate, or show due diligence to collect, and failure..... *ib.*

4. Opposition to an administrator or executor's account, may be presented and filed after the lapse of three judicial days from its rendition, and at any time before steps are taken to have it homologated by the court.

Chiasson's Heirs vs. Dupuy et al. 57

5. To compel an administrator to account, all the parties must be properly before the court; the heirs of the deceased partner properly represented, as well as the surviving partner of the community.

Douglass and Wife vs. Edwards and Wife, 235

6. An executor or administrator ought not to be compelled to render two separate accounts, relating to a single succession..... *ib.*

7. Until an heir is recognised and admitted as such, he has no right of action against the curator or administrator of the estate of the deceased to compel an account, and is not entitled to notice of the proceedings in relation to the administration. In the meantime, the attorney for absent heirs can call on the administrator to render an account.

Stein vs. Bowman, Curator, 281

8. A provisional account and prolongation of the administrator's term is not conclusive on the heirs at law, who may afterwards appear and be recognised. The judge is to receive and approve such account on his official responsibility, contradictorily with the attorney for absent heirs..... *ib.*

9. Where the executor charges full commissions on the appraised value of the inventory of all the common property belonging to the husband and wife and he afterwards is appointed her executor, he cannot charge commission on the value of certain slaves bequeathed by the husband to legatees, of which his testatrix retained the usufruct during her life.

Millaudon vs. Cajus, Executor, 306

10. The administrator is without capacity to purchase property at the sale of a succession administered by himself; and it is equally clear he cannot do so by means of an agent, or person interposed for that purpose.

Macarty vs. Bond's Administrator, 351

11. An opposing creditor may attack a sale of property of an estate as being illegally made to the administrator, without alleging fraud and injury to himself, when the evidence shows that in fact no contract of sale exists, under such circumstances, for want of proper parties capable of contracting. *ib.*

12. Where the executor refused to pay over the funds of the estate to the heirs, on a rule requiring him to do so, but appealed, he was mulcted into five per cent damages on the amount of funds in his hands for the delay.

Guesno's Heirs vs. Cucullu, Executor, 415

FRAUD AND SIMULATION.

1. In an action by the syndic of creditors to annul certain sales made by the absconding debtor, on the ground of fraud, it is not sufficient that the

insolvent debtor, and a person acting as the common friend of both parties, were guilty of fraud and simulation, to enable the plaintiffs to succeed, if it appears the purchaser acted fairly and honestly.

M'Manus's Syndic vs. Jewett, 170

2. Fraudulent and dishonest acts done by the vendor of the plaintiff, against the rights of the defendants, cannot affect them, unless it be shown that they were *particeps fraudis* by combining and colluding with the defrauder.....*Jones et al. vs. Purvis et al.* 288

3. Where a purchaser is in possession under a conveyance, the question of fraud cannot be inquired into collaterally, in a case commencing with a seizure ; the party complaining must bring a direct and revocatory action.

Weeks vs. Flower et al. 379

4. Where a plaintiff in injunction sues for vindictive damages, alleging his possession of the property seized and enjoined, the defendant may repel the action by showing that the contract of sale under which the plaintiff claims and bases his right, is a *simulation*, and intended to cover the property from the defendant's claim against the true owner... *ib.*

5. A fraudulent purchaser who obtains property by fraudulent representation, acquires only a naked possession, which gives no right to any of his creditors to attach in his hands...*Parmele et al. vs. M'Laughlin*, 436

6. A purchaser of goods obtained by the seller through fraudulent representations, who buys with full notice of such fraud, acquires no right or property in them ; they are liable to the claim of the true owner in his hands..... *ib.*

FREIGHT.

1. When damaged goods are delivered and received by the consignee, without objection, particularly where the damage is apparent upon simple inspection, a rigid enforcement of the rule requiring the carrier to prove the damage was occasioned by *vis major*, might operate with injustice. There is an apparent compliance on his part with the conditions of the bill of lading ; and by receiving the goods, the consignee becomes liable for the freight.....*Shackleford vs. Wilcox et al.* 33

2. The owner or master of a vessel is not liable for damages done to deck freight arising from the dangers and waves of the sea, and the necessary exposure of the property on deck, stowed there with the consent of the owner..... *ib.*

HEIRS.

1. The mortgage acquired by a third person to dotal or paraphernal property of the deceased wife, after it is even illegally adjudicated by the Probate Court to the surviving husband, will bind her heirs, if executed before any act is done by them to annul the sale.

Foutclet et al. vs. Murrell, 299

2. The heirs have the right at any time to claim and take the seizin, and possession of the estate from the testamentary executor, on offering him a sufficient sum to pay the moveable legacies.

Guesno's Heirs vs. Cucullu, Executor, &c. 415

3. The heirs succeed to all the rights of the ancestor, and among other rights devolving upon them is that of suing and compelling a compliance with the intentions of the ancestor, as expressed in his last will and testament.....*Poydras vs. Taylor*, 488

4. So where the testator provided in his will, that his slaves should be sold with and attached to his plantations on which they were found at his death, and the purchaser under the conditions of the will, was about to alienate them separately: *Held*, that the heir can maintain an action in behalf of the slaves, to prevent their sale, in violation of the conditions of the will, and compel a compliance with the intentions of the testator as expressed therein..... *ib.*

5. The heir who succeeds to the rights of his ancestor may, after the executors are discharged, enforce the provisions of the ancestor's will, and see that his intentions are carried into effect against purchasers; although the heir has no other interest in the matter.....*Poydras vs. Mourain*, 492

6. So where the testator provided in his will, that his slaves should be sold as attached to the plantations on which they were situated at his death, and the purchasers were required to conform to this condition: *Held*, that the heir can maintain an action to prevent the purchaser from selling the slaves, contrary to the provisions of the will..... *ib.*

7. The heirs of a deceased partner in the community of acquets and gains, having a joint interest, can maintain an action for their interest against the third possessor of a slave, alienated by the husband after the dissolution of the community..... *German vs. Gay et al.* 580

HUSBAND AND WIFE.

1. According to the provisions of the Spanish law, (Partida 4, 11, 1 and 17,) the wife has a tacit mortgage on the property of her husband, for the restitution of both her dotal and paraphernal effects.

Gasquet et al. vs. Dimitry, 585

2. The part of the legislative act of 1813, which requires marriage contracts to be recorded, in order to have effect as a mortgage against third persons, on the property of her husband, for the restitution of the wife's dotal and paraphernal effects was repealed by the Louisiana Code, in 1825. *ib.*

3. Where the wife signs an act of mortgage with her husband, given to secure a debt for his benefit, in which she renounces, formally, all her rights, privileges and mortgages on the property, ceding and transferring them to her husband's creditor: *Held*, that this is a contract entered into

by the wife conjointly with her husband, *binding* herself for his debts, which is expressly prohibited by the Louisiana Code, article 2412; and such renunciation on her part is null and void.....*Gasquet et al. vs. Dimitry*, 585

4. The wife cannot validly bind herself for her husband, or for his debts, even with his consent; for this would place her rights entirely under his control. *ib.*

5. Where the wife renounces her right of mortgage in favor of her husband's creditor, as a security for his debt, she thereby becomes his surety, and does indirectly that which she is positively forbidden by law to do directly.....*Gasquet et al. vs. Dimitry*, 592

6. The wife may sell or enter into a contract of mortgage in relation to her dotal or paraphernal effects and rights, with her husband's consent; but such contracts must be for her benefit, or that of her and her husband..... *ib.*

7. It is not of the essence of suretyship that the obligations of the principal and surety should be co-extensive. If the wife renounces her right of mortgage, and cede it in favor of her husband's creditor, she becomes surety for a debt of his contracting, so far as her interest in the mortgaged property is concerned..... *ib.*

8. The *Senatus Consultum Villeianum* of the Roman law, is the fountain of our legislation, in relation to the rights of married women. As relates to mortgages and sales, the *Senatus Consultum* gave the wife who had pledged her own property to her husband's creditor, the right to recover it back, even after it had been sold..... *ib.*

INJUNCTION.

1. The act of 1833, relative to injunctions, disallows the principle established by the Supreme Court, (5 Louisiana Reports, 87,) "that a privity must exist between the party enjoining and the judgment enjoined," to entitle the party to damages.....*Offutt et al. vs. Hendsley et al.*, 1

2. To entitle a party to an increase of damages, for the wrongful suing out an injunction, suit must be instituted on the bond..... *ib.*

3. Where certain moneys arising on the balance of a judgment are ordered to be paid into court, and before it is deposited execution issues for the whole amount of the judgment, an injunction will be sustained for so much of said moneys as are shown to have been paid, and for such further sum as the defendants in the judgment will be entitled to receive in their own right, and dissolved for the remainder.....*Millaudon et al. vs. Percy et al.*, 441

INSOLVENCY.

1. Where an order of arrest issues on the affidavit of a single creditor, imprisoning the insolvent and sequestering his property, the act enures to the benefit of all the creditors.....*Ratti & Pison vs. Their Creditors*, 22

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2. The sequestration, when once made is irrevocable, except on payment of the debts of all the creditors.....*Ratti & Pison vs. Their Creditors*, 22
 3. The person of the insolvent may be discharged from imprisonment, on giving security; but the penalty of the bond should be large enough to cover all the debts, and to indemnify all the creditors in case of its breach. *ib.*
 4. The condition of the bond is, that the insolvent shall remain within the jurisdiction of the court, until definitive judgment of homologation is pronounced; any partial homologation of the proceedings will be disregarded. *ib.*
 5. According to the provisions of the insolvent law of 1808, relative to debtors in actual custody, the creditors have a right to confront their debtor in open court, or before the judge at chambers, and if such opportunity has not been afforded them, in consequence of the non-appearance of the debtor, the court *cannot grant him a discharge*.....*Bott vs. His Creditors*, 40
 6. Where a stay of proceedings is ordered, and a day fixed for the meeting of creditors, if the debtor fails to appear or show cause by counsel for his non-appearance, and obtain a continuance, all the proceedings are at an end under the first order of court..... *ib.*
 7. The retention by a syndic of any part of the property surrendered, without selling enough to pay the debts of the insolvent, is improper; and he is accountable for its value to the creditors.....*Patin vs. Her Creditors*, 64
 8. The creditor who demands the arrest of his insolvent debtor, must set forth the circumstances which induce him to make the oath; but it is sufficient if these circumstances are disclosed by reference to the petition, schedule or other documents in the case. A detail of them is not required in the affidavit.....*Passebon vs. His Creditors*, 189
 9. The article 223 of the Code of Practice, requires the creditor to swear he *verily believes* the facts in his affidavit; but these words are not sacramental. The affiant may swear, *he suspects and fears* his debtor is about to depart, &c., and it will be deemed sufficient..... *ib.*
 10. In cases of opposition to the appointment of syndics, the question is not whether the proceedings before the notary shall be homologated, which does not require a judgment of the court, but whether the opposition shall be sustained on the ground that the syndics were not elected by a majority of legal votes.....*Pandelly vs. His Creditors*, 387
 11. The proceedings of creditors before a notary in appointing syndics, are not vitiated because some illegal votes are given. These are to be struck out from the proceedings..... *ib.*
 12. The creditor may prove his claim and vote for syndics by proxy or agent, who can swear to the fact of the debt being due and owing, of his own knowledge..... *ib.*
 13. Any evidence which satisfies the notary of the authority of an agent to vote for syndics, is *prima facie* good, and when no objection is made, he

cannot refuse the vote; but the notary does not decide on the reality of the debts, and if he did, it would not conclude the other creditors.

Pandelly vs. His Creditors, 387

14. Creditors not making opposition to votes for syndics before the notary, may do so within ten days after the proceedings are returned into court; but then the burden of proof is on the opposing creditor, to show the illegal votes *ib.*

15. The principle, that claims of creditors on which they vote, may be investigated previously to the homologation of the appointment of syndics, is confined to cases of forced surrender, according to the Spanish law. The statute of 1817, relating to voluntary surrenders, requires only *ex parte* evidence of the debts, previous to voting for syndics..... *ib.*

16. The *majority in amount*, required to elect a syndic when there are more than two candidates, is not an absolute majority of all the votes given, but only a plurality or the highest number..... *ib.*

17. It is only on an opposition to the tableau of distribution, that the validity and relative rank of debts is to be finally and contradictorily tried between all the creditors..... *ib.*

INSURANCE.

1. Where a policy of insurance against fire covers fifteen thousand dollars of the property insured, and a second policy is taken out of another office on the same property as a valued one, which is endorsed on the first policy, it cannot have the effect of putting the first office *in duriori casu*, or to convert its policy from an open to a valued one.

Millaudon vs. Western Marine and Fire Insurance Co. 27

2. If a subsequent policy contain no provision in respect to prior insurances, the amount of insurable interest in it will be the same as for the first policy; for the insured may insure again and again the same property, but can recover but one indemnity, and this he may recover of the first or subsequent underwriters. Those who pay the loss, may demand a proportionable contribution from the other underwriters, who are in this respect sureties for each other *ib.*

3. Insurance on merchandise, furniture or buildings against fire, is governed by the same rules as to valuation, as a ship or cargo. If the policy is open in its form, the value of the interest must be proved *ib.*

4. The amount of interest insured in a subsequent policy, will depend on the amount insured in previous policies. A cargo valued at twelve thousand dollars, and in a second policy was insured at twenty-seven thousand five hundred dollars; there remained an insurable interest of fifteen thousand five hundred dollars, embraced by the second insurance *ib.*

5. An error in stating the time when a vessel sailed, so as to place her *out of time*, when the insurance was effected, will be considered a misrepre-

sentation and concealment of the true time, whether made erroneously or intentionally, sufficient to avoid the policy and release the insurers.

Currell et al. vs. Mississippi Marine and Fire Insurance Co. 163

6. A knowledge of the true date at which a ship sails, is all-important to the insurers who are about to take upon themselves the risk of her safe arrival at the port of destination..... *ib.*

7. Where cotton is shipped by the agent of the plaintiff, and consigned to J. L., who receives a bill of lading, and about the same time is directed by the agent to turn over the cotton to R. B. & Co., the commission merchants of the plaintiff, and in the meantime the cotton is lost by the perils of the river: *Held*, that having been consigned to J. L. by the shipment, it was protected by his open policy, making insurance for all whom it might concern on all cotton in bales shipped, or to be shipped, to the consignment of J. L.

Ballard vs. Merchants' Insurance Co. 258

8. It is not of the essence of a consignment that the consignee shall sell or dispense of the property consigned. It is enough if he has a right to receive it, of which the bill of lading is evidence, even if he is directed to deliver it over to another agent to sell for the owner..... *ib.*

9. When an open policy of insurance once attaches to property consigned, the consignee becomes the agent of the shipper, and can do no act to deprive the latter of the right to sue in his own name on the policy..... *ib.*

INTEREST.

1. Interest stipulated in contracts, ought to be allowed in putting these claims on the tableau of distribution of an estate, because it makes part of the debt due to the claimant *Patin vs. Her Creditors*, 64

2. The price of immoveables producing fruits, bears interest from the time it is due, which is its accessory and forms part of the capital; and the privilege or mortgage of the vendor extends to the accessory or interest as it becomes due on the price..... *Caldwell vs. His Creditors*, 265

3. The vendor's privilege is a right growing out of the nature of the contract, inasmuch as the transmission of the property is not perfect until the price is paid; which is composed of the capital and interest. The interest represents the fruits of the immoveable sold..... *ib.*

4. But interest promised in an accordat with creditors to be paid on a privileged debt, is not itself a privileged claim..... *ib.*

5. Interest continues to run and is due on the price of property ceded to creditors under the insolvent laws; and conventional interest is due on claims against an estate, even when there is not a sufficiency for all..... *ib.*

6. Legal interest does not run on a note given for a lottery privilege from maturity, when it is not protested, but only from judicial demand.

McGuire vs. Mead, 311

7. Where interest is stipulated to be paid on the balance of a sum of money as soon as it is demanded, and a delay or refusal to pay; when no demand is shown by the party claiming the interest, it will not be allowed.

Millaudon et al. vs. Percy et al. 444

8. Where it was stipulated in a mortgage taken to secure a note, which omitted to mention interest, that the debtors might prolong the payment of part of the note, by paying a discount of one half at the end of the year, to be credited thereon, and on failure to be liable to pay the whole amount, principal, interest and costs: *Held*, that the party was bound to pay interest from the time the note became due, without any formal demand, when it had lain over for a considerable time.

Consolidated Association Bank vs. Foucher et al. 476

9. In notes given to banks, if no rate of interest is specified, it will be inferred that the contract was made in reference to the charter, and governed by the rate of interest fixed therein..... *ib.*

10. Interest cannot be demanded on a note for money loaned, when there is no protest for non-payment, or stipulation that the party failing shall be deemed in default under the 1905th article of the Louisiana Code..... *ib.*

JUDGMENT.

1. The judgment or decree of a court in another state, appointing guardians to minors living there, to prosecute or defend a particular suit here, is not evidence of a general authority in them to sue for and settle a succession inherited by the minors in this state.

Douglas and Wife vs. Edwards and Wife, 234

2. But if the judgment of a competent tribunal in another state, confers a general authority on guardians in legal form to represent the minors in all things relating to their property in this state, it will be received as evidence of the authority of the guardians to do all necessary acts here *ib.*

3. The record and judgment of a suit against the plaintiff by a mortgage creditor, under which a tract of land, sold by the former to the defendant, was seized and sold, is admissible in evidence in an action for the return of the price under the plea of eviction.....*Landry vs Gamet,* 246

4. A record and judgment of eviction in a possessory action, cannot be offered in evidence in a petitory action between the same parties, or their vendors and warrantors about the same lands..*Jones et al. vs. Purvis et al.* 288

5. A judgment obtained by the heirs of the deceased wife against the surviving husband, annulling the adjudication of the property of the succession to him, on the ground of its being paraphernal effects, and illegally sold, will not affect purchasers and mortgagees who derive title from the husband under the first sale and adjudication to him. As to them it is *res inter alios acta*.....*Foutelet et al. vs. Murrell,* 291

6. Judgment may be taken on confession of the defendant, without a trial, for the sum admitted to be due and owing; and the right of the plaintiffs will be reserved as to the remainder of their claim which they dispute..... *Parsons et al. vs. Suarez*, 411

7. Where two plaintiffs sue, and the defendant admits he has a certain sum in his hands which is due to one of them, judgment on this confession can only be taken in favor of the one to whom the debt is admitted to be due and owing..... *ib.*

8. The judgment is the highest evidence of a debt, and the title merges in the judgment; but proof of its discharge may be made by circumstantial evidence as well as by that which is positive... *Abat vs. Buisson, Curator &c.* 417

9. The defendants in a judgment who were required to pay a certain sum of money into court for distribution among the stockholders of a bank, may retain in their hands the amount due them as a part of the stockholders who are entitled to a share..... *Millaudon et al. vs. Percy et al.* 444

10. A judgment obtained in the United States District Court against the sureties in a paymaster's bond, is domestic, although not examinable in the state courts; but not being revised or reversed by the Supreme Court of the United States, is *res judicata* and conclusive evidence against the parties, of all things adjudged by it. It is admissible in evidence in the case of one of the co-sureties against another, requiring him to contribute his proportion of the whole sum for which all the sureties were condemned.

Rochelle's Heirs vs. Bowers, 528

11. The judgment in a suit to which the plaintiff was not a party, does not form *res judicata*, against him; yet when he had notice of the suit, and took an interest to prevent a decision against the defendants, they are exculpated from the charge of neglect or collusion.

Davis vs. Louisiana Tow Boat Company, 575

LAND LAWS.

1. The laws of Congress granting settlement or pre-emption rights, give no absolute title in themselves, but only grant a preference in purchasing from the United States government on certain conditions prescribed; and the individual claiming a right under them, obtains a title from the government only by a compliance with all the conditions imposed.

Orillion & Lacroix vs. Deslonde, 53

2. The act of congress passed April 12, 1814, granting pre-emption rights to settlers, requires a part of the price of the land to be paid at the time of entering; and where this is omitted, and another purchases the government right, and pays the price even after entry, but before the payment of any part by the first purchaser, he will hold the land..... *ib.*

3. As between the lessor and tenant of a tract of public land, if the latter find the true title is in another, or in the government, he has a right to purchase and hold it, without being considered as acting fraudulently towards his lessor.....*Jones et al. vs. Purvis et al.* 228

4. But as relates to purchasers under pre-emption laws, and in ordinary cases, perhaps, a distinction might be made, when the purchaser used the means he had received from his lessor of obtaining by pre-emption, when the latter would have been entitled to the preference under the same law..... *ib.*

LEGISLATIVE PRIVILEGE.

1. The act of the territorial legislature, passed 22d of April, 1806, requiring courts of justice to stop all proceedings against members of the legislature in actual attendance, and who claim their privilege, is not repealed or superseded by the adoption of the constitution of Louisiana.

Bradshaw et al. vs. Dickson, 485

2. A member of the legislature in actual attendance, can claim his privilege and stop the proceedings in a trial against him after it has commenced; and a refusal to allow it when claimed, at any stage of the cause, is ground for reversal of the judgment against him..... *ib.*

MANDAMUS.

1. A mandamus will not be awarded to compel the judge *a quo* to grant an appeal from an order or interlocutory judgment, overruling exceptions to the right of a creditor to file an opposition to proceedings in insolvency.

Garcia & Buyo vs. Their Creditors, 93

2. The writ of mandamus is provided for in all cases where the law has assigned no relief by the ordinary means, and where reason and justice require some mode of redressing a wrong.

Lallande vs. President and Directors of Louisiana State Insurance Co. 326

MASTERS AND OWNERS OF VESSELS.

1. Where the owner of a steam-boat suffered a slave to be employed as a hand on board by the captain, without the authority and consent of the owner, and he was accidentally drowned: *Held*, that the owners of the boat were responsible and liable to pay his value; because by using due diligence they might have prevented the illegal employment of the slave, and did not.....*Strauchbridge vs. Turner et al.* 213

MINORS.

1. Informalities and relative nullities in the settlement of successions and dispositions of property inherited by minors, must be taken advantage of by the minors themselves. As respects third persons, such transactions are valid.....*Foutelet et al. vs. Murrell,* 299

2. Where minor heirs claim a restitution *in integrum*, they are bound to place matters as they were before. If they claim the property in nature or in kind, they must refund the amount received by them on account of it.

Foutelet et al. Murrell, 291

3. The sale of the property of a minor by his curator *ad bona*, when there is no ratification or concurrence of the minor, after he became of age, will be regarded as a nullity.....*Miers vs. Bethany*, 374

4. The plea of prescription of ten years' possession, under a just title and sale of minor's property, will not avail, when the entire ten years have not elapsed since the minor became of age..... *ib.*

5. The provisions of the Louisiana Code, article 2297, making the parents of minors responsible for the damages done by their minor children, while under their care, is found under the head of *quasi offences*, and does not relate to the contracts of minors, &c....*Doumeing vs. Haydel, Tutor, &c.* 446

6. The emancipation of a minor under the provisions of the act of 1829, gives to him all the power over his property and rights, which appertain to persons of full age.....*Harman et al. vs. McCauley*, 567

7. Whether the minor is domiciled in the parish where the property inherited by him is situated, or in a foreign country, the Court of Probates of the place where the inheritance lies, must appoint a tutor to administer it. *ib.*

MORTGAGE.

1. When mortgaged property passes by judicial sale into other hands than the mortgagor or judgment debtor, the mortgage attaches to the price, and the purchaser takes the property free of incumbrance.

Offull et al vs. Hendsley et al. 1

2. But where a slave is seized and sold by a judgment creditor, and purchased in on a twelve months' bond by the debtor himself, the slave is immediately affected by the mortgage resulting from both the judgment and twelve months' bond..... *ib.*

3. Where a debtor buys in his own property on a twelve months' bond, it is not released from the mortgage resulting from the judgment under which it was sold..... *ib.*

4. A subsequent mortgagee, the vendee of the original mortgagor, having an interest, may discharge all anterior mortgages, and as a matter of right, be subrogated to all the creditor's rights to the mortgaged property..... *ib.*

5. There is no privity of contract between the vendee of a mortgage and the creditor of the original mortgagor..... *ib.*

6. The original mortgage creditor may indulge his debtor with a delay, or in any other manner to facilitate the payment of his debt, without violating the rights of a subsequent mortgage, between whom there is no privity of contract..... *ib.*

7. A mortgage creditor having the vendor's privilege and mortgage, with personal security, and an additional mortgage by a judgment and sale of the mortgaged property on a twelve months' bond, with security, may pursue either of his remedies, by seizure and sale of the property in the hands of a third possessor, or proceed against the sureties.

Offut et al vs. Hendsley et al. 1

8. The privileges and mortgages of creditors to property sold at the probate sale of a succession, attach to the price, and the purchaser takes the thing sold free of incumbrance, when these creditors were creditors of the deceased; but if not, then their mortgages follow the property as a real right, into whose soever hands it may come..... *ib*

9. The legal or tacit mortgage of the wife for the restoration of her paraphernal effects attaches to the community property from the time they came into the possession of the husband. Her judgment of separation, although obtained subsequently to a mortgage given on the property by her husband, will hold it to the exclusion of the husband's mortgage creditor.

Patin vs. Her Creditors, 64

10. Mortgages executed in New-Orleans, and not recorded in the parish where the mortgagor resides, until after he makes a surrender of his property to his creditors, cannot affect creditors and third persons, who are such at the time of the surrender..... *ib*.

11. The action to annul a mortgage made by a debtor, on the ground of fraud as relatèd to creditors, must be commenced within a year from the date of the judgment, which the creditor seeking it, has obtained against the debtor.....*Dixon vs. Emerson,* 104

12. In an action to annul a conventional mortgage, as made in fraud of creditors, when the pleadings admit the existence of the act importing the mortgage, it is unnecessary to prove it. The only question is, whether the mortgage ought to be annulled, as having been made in fraud..... *ib*.

13. The transferee of a mortgage standing in the name of the original mortgagee may exercise his right of mortgage, on making proof of the transfer, without having the mortgage inscribed in his name.

Rouquette vs. His Creditors, 154

14. Where a mortgage is regularly recorded before sale and conveyance of the property in dispute to the defendant, who is third possessor, and before the latter became a creditor of the mortgagor, ought he to be allowed to impeach the validity of the contract of mortgage as against the mortgagee? *Quere?*.....*Deverges vs. Lanusse,* 176

15. Where the consideration of the contract of mortgage is impeached by the third possessor of the mortgaged premises, *prima facie* evidence of the genuineness inherent in the contract itself, coupled with proof of advances of money &c. to the mortgagor by the original mortgagee, will authorise the latter to recover against such third possessor..... 177

16. An inscription of a mortgage made the day before the death of the debtor by one of the creditors, will have effect against all the others, although the succession proves insolvent and insufficient to pay all the creditors.....*Garnier et al. vs. Peychaud's succession*, 182

17. Where certain slaves belonging to the community were adjudicated to the widow, the acceptance of a special mortgage by the court of probates, with the advice of a family meeting, in lieu of the legal one, liberates the slaves from the legal mortgage as respects third persons.

Cassanova's Heirs vs. Avegno, 192

18. If a purchaser, finding the rights of minors are secured by a special mortgage on the property of their tutor, he is warranted in concluding that the general mortgage has ceased to exist..... *ib.*

19. The mortgage and privilege of the vendor results from the sale itself, although the conditions are prescribed by judicial authority or order of court; and the question to which of the parties litigant the proceeds should be decreed is still left open. The mortgage is conventional, resulting from the sale, and takes effect as soon as it is completed.

Zacharie's Administrator vs. Prieur et al. 197

20. Where property in dispute is sold with the consent of the parties, by an order of court, and a mortgage is retained, the purchaser becomes the debtor to him who is decreed to be the true owner. But at the death of the mortgagor in the mean time, and sale of his property by order of the Court of Probates, the mortgage is raised, and the purchaser takes it free of incumbrance. The mortgage attaches to the proceeds in the hands of the administrator..... *ib.*

21. A mortgage which is not recorded in the parish judge's office where the property is situated, until after the death of the mortgagor, cannot have effect against his other creditors, who are such at his death.

Macarty vs. Bond's Administrator, 351

NAVIGATING VESSELS.

1 Where a schooner is floating down stream, unable to use her sails, and a steam-boat is running up under full steam, it is incumbent on the latter to show that she made use of all proper means of precaution to avoid a collision, or she will be liable for the damage done, by running down the schooner.....*Sauné vs. Tourné & Beckwith*, 428

2. Steam-boats meeting vessels on the river, propelled by wind, should observe different rules of precaution, than in relation to other steam-boats. In such cases, the obvious means to avoid collision, is an alteration in the direction of the steamer..... *ib.*

OBLIGATION.

1. A receipt given for notes to be collected and paid over, or returned when called for, is rather evidence of a mandate than an obligation to pay money, in which the subscriber to the instrument of writing constitutes himself an agent, to secure and receive payment and pay over the sums collected.....*Jouett vs. Erwin et al.* 231

2. The necessity of the case does not require that obligors *in solido* should be sued together. To create a new exception in favor of such obligations, would be a violation of positive law.....*Millaudon vs. Turgeau et al.*, 547

3. Strictly speaking, the drawer and endorser of a note or bill are not bound jointly, either to the holder or amongst themselves, according to the definition in the code, but only *in solido*..... *ib.*

4. The plaintiff has a clear and adequate remedy by suit, separately against either the drawer or either of the endorsers of a promissory note, because the obligation is not joint, but *in solido*..... *ib.*

PARTNERSHIP.

1. Between the partners of a commercial firm and a clerk, who in addition to his monthly salary is to receive a share of the profits, there is not necessarily any partnership created.....*St. Victor vs. Daubert*, 314

2. A clerk on a salary, and allowed a share of the profits, is not thereby constituted a partner, and cannot bind the firm further than the express or implied consent of the partners authorise him..... *ib.*

3. So, a clerk entitled to a share of the profits of a commercial partnership, who collects funds of the firm, cannot retain them under pretence that they are his share of the profits. He may be sued by the firm, and required to disgorge the sum thus received by him..... *ib.*

PLEADINGS.

1. Under the plea of the general issue, evidence of payment will not be received.....*Mortimer vs. Trappan's Estate*, 108

2. Compensation or payment must be pleaded to authorise the admission of evidence showing that the plaintiff had received various sums of money, not credited, to a greater amount than the sum sued for.. *ib.*

3. The plea of payment is a peremptory exception, going to extinguish the action, and which is required to be pleaded specially..... *ib.*

4. In an action on a promissory note, payable at a particular place, it is alleged in the petition that the note was duly protested for non-payment, and the protest offered in evidence, shows that payment was demanded at the proper place, a recovery will be had without an *allegation* that payment was demanded *at the place* where the note was made payable.

Voisin's Agent vs. Jewell, 112

5. The plea of the general denial which puts at issue all the facts on proof of which rests the plaintiff's right to recover, is not waived by a subsequent plea setting up the defendant's agency as a defence against the action. The two pleas are not inconsistent...*Bloodgood et al. vs. Hawthorn*, 124

6. When the question at issue by the pleadings, was, whether a certain engine was delivered as a condition precedent to the defendant's right to take out execution against the plaintiff, or not, no evidence will be received to prove damages for the detention and failure to deliver the engine..

Nicholls vs. Hanse et al. 268

7. Where the judgment is for the land *described in the petition as about thirty arpents*, and which is all the plaintiff demanded, he cannot allege error and have the judgment amended, on the ground that on actual admeasurement the land is found to contain a larger quantity.....*Conway vs. Winter*, 271

8. The pendency of a suit in the United States District Court to enforce a demand founded on a contract of sale, the validity of which is attacked and its rescission sought, cannot be pleaded as an exception to another suit in the state court, between the same parties for a similar demand, founded on the same contract of sale.....*Hampton's Heirs vs. Barrett*, 336

9. Where a person of color alleges, he is free and has been so for many years, he will be allowed to avail himself of any legal evidence in his favor under this plea, without being bound by the pleadings to specific proofs.

Montreuil et al. vs. Pierre et al. 356

10. The plea of *litis pendentia* is a dilatory exception, which comes too late after swearing the jury. In order to avail the party, it must show the tendency of another suit between the same parties for the same object, growing out of the same cause of action, before another court of concurrent jurisdiction.....*Weeks vs. Flower et al.* 379

PRACTICE.

1. Where a balance is shown to be due by a company to A, who assigns it to B, and the latter sues on it, the company cannot produce in evidence another contract between them and A, to show his failure to perform it; and that he owes them damages.

Hoffman vs. Pontchartrain Rail Road Co. 20

2. The defendant cannot set up a claim for unliquidated damages on a contract, in compensation of a liquidated demand..... *ib.*

3. The rules of practice in filing answers to appeals in country cases in the eastern district, tried in New-Orleans, will be relaxed when justice requires it. They are called for trial as they stand on the docket, and if the answer is in when the case is called up, it will be heard.

Patin vs. Her Creditors, 64

4. An allegation in the petition that the note sued on, which was payable at a particular place, was duly protested, and the protest offered in evidence showed that payment was demanded at the proper place, a recovery will be had without *alleging* that payment was demanded at the place where the note was made payable..... *Voisin, Agent, &c. vs. Jewell*, 112

5. Objections to evidence should be made at once, so as to give the adverse party an opportunity to obviate them or correct his mistakes..... *ib.*

6. Where the answer of the defendant admits the debt claimed, but avers it was contracted while he was in partnership with another person, and there is no proof of the partnership, the plaintiff will recover as on a confession of the debt..... *Baker vs. Stewart*, 159

7. In an action on a special agreement for the *price* of putting up a mill, evidence of the *value* of the work and labor done on it will not be admitted; the parties having agreed on the price..... *Morton vs. Pollard*, 174

8. Where the plaintiff failed to prove that he done certain work for the defendant, according to an alleged specific agreement, and also failed to show that the work was beneficial to the latter, he cannot recover, either on his contract or on a *quantum meruit*, but will be non-suited.

Duffy vs. Byrne, 211

9. In taking judgment by default, and making it final in the absence of any defence, on proving the plaintiff's demand, no evidence can be legally given of a fact not *alleged* in the petition.

Louisiana State Bank vs. Senecal, 225

10. When the charge of the judge is pertinent to the issue, and the law is correctly stated, it is no solid objection thereto, that it might have been misunderstood by the jury, and had a tendency to mislead them.

Milne vs. Pontchartrain Rail-Road Co. 252

11. The party possesses the right who is apprehensive the charge of the judge has been misunderstood by the jury, to apply for a clearer exposition of the meaning of the court..... *ib.*

12. The fact of a cause being taken up and tried on a different day from that fixed for its trial, is not of itself a fatal error..... *Cooley vs. Seymour*, 274

13. A record and judgment of eviction in a possessory action, cannot be offered as evidence of title in a suit where the same parties are concerned, and about the same land, when the action is a petitory one.

Jones et al. vs. Purvis, 288

14. A dismissal or discontinuance of a suit, will not be allowed to the plaintiff in cases in which the parties are alternately plaintiffs and defendants, as in a *concurso* and in the case of reconvention.... *McDonough vs. Copland*, 308

15. So where a party publishes a monition under the act of 1834, for the assurance of titles acquired at judicial sales, and an opposition is filed to the

homologation of the sale, the plaintiff in the monition cannot discontinue or dismiss his suit..... *McDonough vs. Copland*, 308

16. The proceedings of the court below will be considered as regular, until the contrary appear; and where a case is stated to be on trial of a Friday, it will be presumed to have commenced the day preceding, being the one for which it was fixed for trial..... *Minor et al. vs. Lanbelle*, 323

17. The affidavit of the defendant annexed to his answer, that his signature to the note sued on is forged and counterfeited, will not be permitted to go to the jury as evidence, when not made the basis of some preliminary proceeding..... *City Bank of New-Orleans vs. Foucher*, 405

18. The provisions of the Code of Practice, in articles 513, 522, 526, 527, and others, requiring certain forms to be pursued in the trial of a cause, are directory, and a non-compliance with them, when not required at the time by the party complaining, does not import pain of nullity..... *ib.*

19. The party may require the observance of all the forms as far as practicable, which are directed in the trial of a cause; but if, when present, he does not require a rigid compliance with them, and they are substantially complied with, it is not assignable as error, nor sufficient grounds for a new trial..... *ib.*

20. The different modes of proof of handwriting or signatures pointed out by the Code of Practice, are concurrent, and the court is not required to appoint experts for this purpose, unless moved to do so by the party..... *ib.*

21. Objections to interrogatories that they contain leading questions, when the depositions or answers of the witnesses are to be taken on commission, must be made before the commission is forwarded to be executed.

Winn vs. Twogood, 422

22. Where the certificate or caption of the magistrate to depositions is not full and explicit, yet if it appear in substance that the witnesses appeared before him, swore to and subscribed their answers, it will suffice..... *ib.*

23. In a case turning on mere questions of fact, where there are numerous witnesses, and the evidence somewhat contradictory, but the court below being of opinion the weight of the testimony was in favor of the plaintiff, his judgment will be affirmed..... *Sauné vs. Tourné & Beckwith*, 425

24. The Supreme Court is made the judge of facts as well as the law, and have to decide on the weight of testimony. Great respect is due to the verdict of a jury on facts, and it will not usually be disturbed; but when this court differs in opinion with the judge *a quo* as to the weight of testimony in a case, his judgment will be reversed..... *Sloo et al. vs. Tarbe*, 522

PREScription.

1. Where property of a vacant estate has been sold by the surviving partner of a community, and held under a just title, in good faith, *anime*

dominorum for ten years, the claims of the heirs of the deceased partner, who afterwards set up title to the vacant estate, will be barred by the prescription of ten years.....*Davis's Heirs vs. Elkins et al.* 135

2. If an inchoate right once begins under the existing laws of prescription, a subsequent prescription law cannot be made so to operate as to destroy it..... *ib.*

3. The law protects rights acquired by third persons to property of an estate, between the time of opening the succession, and the acceptance of the inheritance, when the estate has remained vacant; and among these rights are those acquired by prescription..... *ib.*

4. An instrument of writing acknowledging the receipt of certain notes for collection, and the money to be handed over, or the notes returned when called for, does not come within that class of obligations which are prescribed in five years. No prescription runs against it until some act is done by which a right of action accrues.....*Jouett vs. Erwin et al.* 231

5. The plea of prescription of ten years' possession under a just title and sale of minor's property will not avail, when the entire ten years have not elapsed since the minor came of full age before the commencement of suit.

Meirs vs. Bethany, 374

PRINCIPAL AND AGENT.

1. Where the principal sues in his own name, for the price of goods sold and delivered by his agent, and thereby ratifies the sale, it is quite immaterial whether the agent had any authority, originally, to sell or not.

Zino vs. Verdelle, 51

2. The agent who represents his principal in a suit, must have authority to do so, so as to allow all legal proceedings to be carried on contradictorily with him, in order to bind the principal.....*Seymour vs. Cooley*, 72

PROOF OF SIGNATURE.

1. The different modes of proof of handwriting and signatures pointed out by the Code of Practice, are concurrent, and the court is not required to appoint experts for this purpose, unless moved to do so by the party wishing it.....*City Bank of New-Orleans vs. Foucher*, 405

2. If a party deny his signature to an act or private instrument of writing, or alleges it to be forged and counterfeited, it must be proven by witnesses who have seen him sign the act, or know his signature from having frequently seen him write. Proof by experts or comparison of handwriting may also be received.....*Plicque & Le Beau vs. Labranche et al.*, 559

3. Proof by witnesses of the acknowledgment of his signature by the party charged, is inadmissible, when he expressly denies, or alleges it is counterfeited *ib.*

INDEX OF PUBLIC USE.

PAGE.

1. There is no particular form or ceremony necessary in the dedication of lands or squares in a city to public use. If the assent of the owner is shown, and the land is actually used for the public purposes intended by the appropriation, it is sufficient.....*Gleisse & Holland vs. Winter*, 149
2. A corporation can maintain a petitory action to remove nuisances and clear the banks of rivers, by showing that the land or place occupied is a public place, and *destined* to public uses..... *ib.*

REDHIBITION.

1. A malady will be considered incurable, so as to authorise the redhibitory action and rescission of the sale on the part of the purchaser, when it baffles the efforts of regular medical aid, and death ensues within three days after the sale.....*Ory's Syndics vs. David*, 59
2. The claim of a purchaser for medical attendance and expenses of burial incurred, relative to a slave, the sale of which is rescinded on account of a redhibitory malady, will be allowed and required to be paid by the seller.... *ib.*
3. In a redhibitory action by the buyer against the seller of a slave, to rescind the sale and restore the price: *Held*, that when the act of sale imports a warranty against redhibitory vices, although it further appears the seller purchased the slave as a notorious runaway, which is shown by reference to the bill of sale from his vendor, yet without a full disclosure of this defect at the time of sale, it does not modify the warranty of the last seller.....*Winn vs. Twogood*, 422

RENUNCIATION.—SEE HUSBAND AND WIFE.

RESCISSION OF SALE.

1. In an action for the rescission of the sale of a slave, as fraudulent, for alleged concealment of the vice of drunkenness, by representing her as a good house servant, on the part of the seller, it will not be considered a case of redhibition, but one of fraud.....*Gaillard vs. Labat et al.* 17
2. Whether the seller of a slave knew of the existence of the vice of drunkenness and concealed it, is a question for the jury; and judgment rescinding the sale will be affirmed, when the verdict finding the fraud is not so unsupported by evidence as to authorise the court to disturb it..... *ib.*
3. A malady will be considered incurable so as to authorise the redhibitory action and rescission of the sale on the part of the purchaser, when it baffles the efforts of regular medical aid, and death ensues within three days after the sale.....*Ory's Syndics vs. David*, 59

4. The claim of a purchaser for medical attendance and expenses of burial, in regard to a slave, the sale of which is rescinded on account of a redhibitory malady, will be allowed, and paid by the seller.

Ory's Syndics vs. David, 59

SALE.

1. A judicial sale, made to effect the payment of mortgage debts, has also the effect of transferring the thing sold free and unincumbered of the mortgage previously existing on it, even when sold for a less sum than that for which it was mortgaged.....*Offutt et al. vs. Hendsley et al.* 1

2. When mortgaged property passes by a judicial sale into other hands than those of the judgment debtor and mortgagor, the mortgage attaches to the price, and the purchaser takes the property free and unincumbered..... *ib.*

3. But where a slave is seized and sold by a judgment creditor, and purchased in by the debtor on his twelve months' bond, it becomes immediately affected by the general mortgage resulting from the judgment, as well as by the special mortgage given in the twelve months' bond to the sheriff... *ib.*

4. So where a debtor buys in his own property, on a twelve months' bond, it is not released from the original mortgage resulting from the judgment under which it was sold..... *ib.*

5. The sale of property on a twelve months' bond, does not satisfy the judgment or novate the debt; and when the property originally seized and sold on twelve months' credit, is again seized and sold under the twelve months' bond, and fails to satisfy it, any other property of the obligors in the bond may be seized and sold to pay it off.

Reboul's Heirs vs. Behren et al. 90

6. Property held in common, cannot be sold under execution issuing against part of the owners. Their interest in the property only, can be seized and sold; and an injunction restraining the sale of the interest of the other owners will be sustained..... *ib.*

7. A sale where the debtor buys in his property on a twelve months' bond, does not cut off previous incumbrances as relates to the debtor himself; nor is his previous title or possession changed by the adjudication.

Fenn vs. Rils, 95

8. So the owner who purchases in his property on a twelve months' bond, acquires no new title or right. As to him, it is not legally a sale, but merely a means by which the creditor acquires additional security..... *ib.*

9. And where A sold B one-third of a lot of ground by private act, which was seized by a creditor of A before the act was made authentic and recorded, and bought in by A on his twelve months' bond: *Held*, that a sale of this property to C, under execution issuing on the twelve months'

- PAGE.
- bond of A, was invalid : *Held also*, that the sale of A to B took effect as to third persons from the time it was recorded, saving the rights such persons had in the meantime acquired to the property.....*Fenn vs. Rils*, 95
10. If A sells property of which he is not the owner, and he afterwards acquires title, that title vests at once in his vendee..... *ib.*
11. Where the buyer is deceived by the representations of the seller, in the quality of the article sold, although the defects are such as might be discovered on simple inspection, but if known, it must be supposed the buyer would not have purchased, it is sufficient cause to rescind the sale and recover back the price.....*Williams vs. Miller et al.* 129
12. The heirs are not bound to execute notarial acts of sale to property of their ancestor's succession, sold at probate sale. The adjudication forms a complete title.....*Berthoud's Heirs vs. Unruh*, 180
13. Those who provoke a sale, are bound to see that its terms are correctly announced. If the terms announced are different from what the law requires, the seller is still bound to comply with them, or the bidder is released from his bid..... *ib.*
14. A notarial act of sale is neither necessary or essential to the purchaser at a judicial sale. The adjudication made and recorded in court, is a complete title to the purchaser. A notarial act may, nevertheless, be useful *ib.*
15. Where certain articles are sold to the defendant, and the seller agrees to put them up for use, and find the materials to do so, and the articles are consumed on the premises of the buyer by fire, before they are all put up, they are at his risk and the loss is his.....*Hunt et al. vs. Suares*, 434
16. Where goods were purchased and directed to be sent to the buyer, at a distant place, consigned to a certain commercial house, they paying freight : *Held*, that before delivery either to the buyer or consignee, the sale was not complete, especially as the buyer had not complied with its terms on his part*Parmele et al. vs. McLaughlin et al.* 436
17. Where the purchaser at sheriff's sale shows a judgment, writ of execution, and sale to him under them, made by the proper officer, all previous proceedings by the latter are presumed to have been correctly made ; but this presumption, like others, yields to contrary proof.
McDonough vs. Gravier's Curator, 531
18. In forced alienations of property, all the formalities of law must be strictly fulfilled, to give validity to the sale..... *ib.*
19. Persons having an interest to cause the alienation of property at sheriff's or other forced sale, to be annulled for want of legal formalities in making it, may claim judicially the rescission of such sale..... *ib.*

20. In forced alienations the property must be described with minuteness and accuracy, so that it can be appraised with such certainty as to ascertain its value, and be sold together or separately to the best advantage.

McDonough vs. Gravier's Curator, 531

21. So, where the sheriff seized property, and described it as "*lands lying between St. Paul and Bertrand streets, in the city of New-Orleans*," and the evidence showed that the ground between these streets had previously been laid off into lots and squares: *Held*, that the description was insufficient, and that the sale under it gave no title to the purchaser..... *ib.*

22. According to the article 702 of the Code of Practice, the sheriff is required to specify the object seized, which must be done in the *return on his writ*, so as to distinguish and specify one object from another..... *ib.*

23. Real or immoveable property in New-Orleans, must be advertised in two newspapers, in the English and French languages, for thirty days, excluding the day when the advertisement commenced and the day of sale, so that thirty entire days may elapse between. The want of this formality is ground of nullity of the sale *ib.*

SEIZURE.

1. Where property is seized for a violation of a city ordinance, although the seizure is lawful in its commencement, yet if the city authorities fail to pursue the requisites of the law in advertising and disposing of it, the acts of the officer making the seizure will be considered as a trespass *ab initio*, for which his constituents are responsible.....*Baumgard vs. Mayor et al.* 119

SLAVES AND COLORED PERSONS.

1. A slave cannot stand in judgment for any other purpose than to assert his freedom. He is not even allowed to contest the title of the person claiming and holding him as a slave.

Berard, f. w. c. vs. Berard et al., f. p. c., 156

2. A colored person shown to be a *statu liberi* in Pennsylvania, and now past the age at which she was to become free, according to the conditions under which she was held in servitude, and had since resided in another free state, with the consent of her owner, she is *thereby* free.

Phillis, f. w. c. vs. Gentin, 208

3. Damages will not be awarded against an innocent purchaser of a colored person as a slave, who recovers her freedom. It would be otherwise against the person who first violated her rights, by selling her as a slave..... *ib.*

4. The master is liable for the acts and injuries done by his slave, acting either by or without his authority or order. He is answerable for

all the damages occasioned by the offence and *quasi* offence committed by his slave, except those done without his order, 'in which case he may exonerate himself by surrendering the slave to be sold. PAGE.

Guerrier vs. Lambeth, 339

5. The fact of a slave being taken to the kingdom of France or other country, by the owner, where slavery or involuntary servitude is not tolerated, operates on the condition of the slave, and produces immediate emancipation.....*Marie Louise, f. w. c. vs. Marot et al.* 473

6. When a slave once becomes free by the operation of the laws and customs of another country or state, to which he was taken by his owner, it is not in the power of the latter ever to reduce him to slavery again..... *ib.*

SELLER AND BUYER—SEE SALE. FRAUD AND SIMULATION.

SEPARATION FROM BED AND BOARD.

1. A solitary instance of ill treatment of the wife by the husband during a long cohabitation, when the origin of it does not appear, and is not aggravated in its character, will not authorise a judgment of separation from bed and board..... *Fleytas vs. Pigneguy*, 419

2. Excesses, cruel treatment and outrages on the part of the husband towards the wife, form a legal ground for separation from bed and board, when it is of such a nature as to render their living together insupportable ; but the court must judge from the proofs and circumstances, not from the opinions of the witnesses, whether these grievances are of such a character as to render the life of a reasonable woman intolerable..*Tourné vs. Tourné*, 452

3. A series of studied vexations and provocations on the part of the husband, without resorting to personal violence, might constitute that degree of cruel treatment and outrages which would form just ground for a separation from bed and board..... *ib.*

4. But the partial treatment of one of the children by the father, and the child's disobedience towards the mother, supposed to result from the father's encouragement, will not be deemed sufficient ground for separation. *ib.*

5. No acts of ill treatment occurring after the inception of suit, can be urged as ground or cause for a judgment of separation..... *ib.*

SURETY.

1. The general provisions of the Louisiana Code, article 3035, excluding judicial sureties from the benefit of the plea of discussion, does not extend and apply to sureties in appeal bonds.....*Chalaron vs. M^r Farlane et al.* 227

2. From the nature and tenor of the obligation contracted by the surety in an appeal bond, he is not bound to pay until the property of every kind belonging to the principal is first taken, and proves insufficient *ib.*

3. Where a surety signed a blank appeal bond, to be used in a particular way by his principal, who puts it to a different use from that intended, by which the responsibility of the surety is greatly increased : *Held*, that the surety cannot avail himself of this matter, unless it is shown the appellee or obligee of the bond was connusant of the fraud...*Chalaron vs. M^r Farlane et al.* 227
4. The surety in a bail bond may surrender his principal in execution, at any time before the conditions of the bond are made absolute by a judgment against himself.....*Wakefield vs. M^r Kinnell* 449

VACANT ESTATE.

1. The word estate, used in the English text of the Civil Code, has the same meaning as the term succession in the French text. It is defined to be "the estate, rights and charges which a person leaves after his death." *Old Civil Code, page 144, article 2.....Davis's Heirs vs. Elkins et al.* 135
2. Vacant estates are to be administered by curators appointed for that purpose. But prescription runs against a vacant estate, though no curator has been appointed..... *ib*
3. A vacant estate is a fictitious being, representing in every respect the deceased, who was the owner of the estate, until the acceptance or renunciation of the inheritance by the heir, and is prescribed against by a lapse of ten years before any act of acceptance..... *ib*.
4. Where property of a vacant estate has been sold by the surviving partner of the community, and held by the purchasers under a just title and in good faith, *animo dominorum*, for ten years, the claims of the heirs of the succession afterwards set up to the property, will be barred by the prescription of ten years..... *ib*.
5. The provisions of the Louisiana Code, articles 934 and 936, calling the heir to the inheritance, and giving him the seizin of the succession immediately on the death of the ancestor, do not destroy the provision concerning vacant estates. No one can be compelled to accept a succession ; and until acceptance or renunciation, the rights of the heir as regards the inheritance, seizin and possession, &c. are suspended..... *ib*.
6. The provision of the Civil Code of 1808, defining a vacant succession to be a fictitious being, representing the deceased, is not contained in the Louisiana Code, promulgated the 20th June, 1825..... *ib*.
7. A vacant estate being a fictitious person, representing the deceased, prescription runs against it instead of the heirs..... *ib*
8. The law protects rights acquired by third persons to the property of a vacant estate, between the time of opening the succession and acceptance of the inheritance by the heir ; and among these rights are those acquired by prescription..... *ib*

WARRANTY.

1. A city marshal or sheriff who sells property under execution, is not such a warrantor of title as to authorise his being cited as such, and condemned to pay as vendor, on a failure of title.....*Morris vs. Abat et al.* 552

2. The marshal or sheriff is responsible in damages to the purchaser who is evicted, for selling a slave or other property without sufficient authority. These officers warrant the correctness and legality of their own acts; and if, by their illegal acts, they cause damages, they are bound to make reparation..... *ib.*

WILL.

1. There is no rule of law requiring the names of the witnesses to a will, to be inserted in the caption, or any other particular part of the instrument: it is sufficient if they sign.....*Chardon's Heirs vs. Bongue,* 458

2. A mere suspension of the proceedings in making and writing a will, by the notary, for two or three hours, in consequence of the weakness of the testator, or his want of decision, or for time to reflect more maturely on the disposition of his property and affairs, when the notary and witnesses do not leave the house, is not a turning aside to other matters so as to render the will illegal or null..... *ib.*

3. The notary is prohibited from interrogating the testator, or so to shape his inquiries while writing his will, as to suggest a particular disposition of his property. A suggestion of the notary is proscribed as a ground of nullity by the Louisiana Code..... *ib.*

4. A last will and testament should first be admitted to probate, and ordered to be executed by some competent tribunal at the place where the succession is opened, before it can be made the basis of a title or claim to property by those inheriting under it*Vidal's Heirs vs. Duplantier,* 525

WITNESS.

1. An attorney in fact who sues in his principal's name to recover debts due to him, is a competent witness to prove the plaintiff's demand.

Zino vs. Verdelle, 51

2. A witness may refer to a memorandum to refresh his memory relating to the facts he is called to testify about. It is not required that the memorandum be contemporary with the facts: it suffices that it was made by the witness, or another, with his privity, when the facts were fresh in his recollection, and that the reading of it restores them when fading in his memory.....*Riordon vs. Davis,* 239

3. A witness will be permitted to refer to a summary of his testimony taken on a former trial, touching the value of certain work which he had

previously examined and approved. This is not for the purpose of reviving his faded recollection of the facts themselves, but to remind him of what he had sworn to on a former trial..... *ib.*

4. If a witness dies before the last trial, his testimony taken on a former trial of the same cause, is admissible in evidence..... *ib.*

5. So the adverse party is authorised to produce the testimony of a witness taken down on the first trial, with a view of showing that it differed from his statements given on the second trial..... *ib.*

6. A witness will be allowed to refer to a report of experts, of whom he was one, which has been set aside, to refresh his memory, when the fact to be proved was, what estimate he had put on the work done ; the reference being as to a memorandum deliberately made at the time..... *ib.*

7. Where one of the parties was called as a witness by the adverse party, and his answers on cross-examination objected to as irrelevant and inadmissible : *Held*, that much latitude is allowed in such cases, especially, when the witness shows that he is interested in the question, and that his opinions may be tested by his own actions in apparent contradiction with them*Hall et al. vs. Ship Chieftain et al.* 318

7. It is no objection to the competency of a witness, that he may be exposed in the course of his examination to have questions propounded to him, the answers to which might subject him to a criminal prosecution. It is his privilege to decline answering them.*Macarty vs. Bond's Administrator*, 351

L. E. J.

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